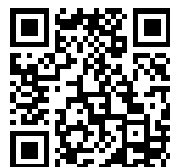

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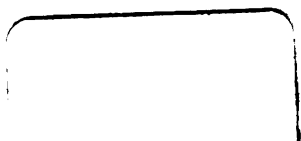
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United States Attorney-General.

OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL

OF THE UNITED STATES,

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS,

IN RELATION TO THEIR OFFICIAL DUTIES;

AND EXPOUNDING THE CONSTITUTION, SUBSISTING TREATIES WITH
FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.



COMPILED, WITH NOTES AND REFERENCES,

By BENJAMIN F. HALL,

COUNSELLOR AT LAW, NEW YORK.

VOLUME III.

PUBLISHED, WITH COPIOUS INDICES AND A DIGEST,

By ROBERT FARNHAM.

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ROBERT FARNHAM,
In the Clerk's office of the District Court of the District of Columbia.

ATTORNEYS GENERAL,

WHOSE OPINIONS ARE REPORTED IN THIS VOLUME.

HON. BENJAMIN F. BUTLER, OF NEW YORK,
APPOINTED NOVEMBER 15, 1833.

HON. FELIX GRUNDY, OF TENNESSEE,
APPOINTED SEPTEMBER 1, 1838.

HON. HENRY D. GILPIN, OF PENNSYLVANIA,
APPOINTED JANUARY 11, 1840.

HON. JOHN J. CRITTENDEN, OF KENTUCKY,
APPOINTED MARCH 5, 1841.

HON. HUGH S. LEGARE, OF SOUTH CAROLINA,
APPOINTED SEPTEMBER 13, 1841.

OPINIONS

OF

HON. BENJAMIN F. BUTLER, OF NEW YORK:

APPOINTED NOVEMBER 15, 1833.

ACTS OF POSTMASTERS GENERAL—HOW FAR CONCLUSIVE.

The act of a Postmaster General in making extra allowances to mail contractors in consequence of alterations made, after the execution of the contract, in the frequency and speed of the conveyances used for transportation, and on account of the increased weight of the mailed matter, are not, where the account is still open, conclusive upon his successor; on the contrary, the latter possesses competent authority to look into such allowances, and where he finds them to have been founded on material errors of law or fact, to correct them as justice shall appear to require.

Postmasters General are merely agents of government, with limited authority; and none of their acts, except those which are found to be within the scope of their authority and conformable to law, are obligatory upon the government. Contractors with them are chargeable with knowledge of the law, and must be presumed to be acquainted with the extent of their powers, and consequently with any departure from them in respect to contracts for transportation of the mails; and cannot, therefore, legally claim any benefit under acts done in contravention of law; for such are void from the beginning, and no legal right can be founded upon them.

But, although Postmasters General have no authority to bind their successors in matters of purely public concernment, the case is different in respect to transactions with individuals. Their authorized contracts with individuals, when not affected by fraud or material error, are obligatory upon successors—the change of incumbents not in anywise affecting nor impairing the rights of the contractors. But the incapacity to vary the contracts of predecessors in office is occasioned by the obligatory force of the contracts themselves—a force as operative, however, upon the officer who made them, as upon his successors—and not because they were made by predecessors. Frauds and material errors, however, may as lawfully be inquired into by successors as by him or them who shall have made the contracts.

Contracts to carry the mail of the United States, without stipulation as to its weight, include the whole mail accruing between the *termini* named therein, or coming into it from other routes, according to the arrangements contemplated when they are made; and, if justice shall demand extra allowance on account of the increased weight, it must be sought of Congress, not of the Postmaster General.

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If extra compensation to contractors shall have been paid by one Postmaster General, without the sanction of an act of Congress, the money so paid may be recovered back.

ATTORNEY GENERAL'S OFFICE,
October 10, 1835.

SIR: I have the honor to acknowledge the receipt of the additional observations of Mr. Key, and the opinion of Mr. Glenn, in the case of Messrs. Stockton & Stokes and L. W. Stockton, referred to me by your communications of the 30th of June and the 6th of July; and as I am now in possession of all the arguments intended to be submitted for my consideration on the part of the contractors, I will proceed to state my views on such parts of the case as are proper to be examined in this office.

Your communication of the 30th ultimo, after stating the condition of the Post Office Department at the time you took charge of it, proceeds to inform me that you had deemed it proper to suspend from the credit of the above named contractors certain special allowances recently made to them by your predecessor in office, for the transportation of the mail on routes from Washington to Philadelphia, and from Washington to Baltimore and Wheeling; that the contractors object to the procedure, on the ground, among others, that the greatest of those allowances (being those on the Washington, Baltimore, and Wheeling routes, and amounting to \$84,278) were definitively made by the Postmaster General in June, 1833, and have constituted a portion of their regular pay ever since; that, for the purpose of ascertaining whether there might not be a partial relaxation of this suspension, you have examined the merits of those particular claims, and, having come to the conclusion that the allowances therefor were based on misinformation as to the facts, and on an erroneous view of the law, have decided that they ought not to be consummated; and that the contractors, being dissatisfied with your decision, have requested that the law points might be submitted to the Attorney General for his opinion.

It further appears, from the documents before me, that discrepancies exist in regard to several important facts between the statements made by the contractors and their counsel, and the

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narrative submitted to me in your official communication; and, also, that in respect to various points depending on circumstantial evidence, the contractors and yourself have come to entirely opposite conclusions. On this part of the case you are doubtless aware that the Attorney General has no authority to give an official opinion. The act of 1789, which, so far as this point is concerned, contains the measure of his powers, merely authorizes him "to give his advice and opinion upon *questions of law*, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." In conformity to this law, and to the usage uniformly adopted by my predecessors in office and myself, I shall abstain from any investigation of disputed facts. Without attempting to reconcile any of the conflicting statements, or to ascertain the accuracy of either of the opposing inferences which appear in the papers before me, I shall take it for granted, for the purpose of this opinion, that the statements and conclusions presented to me in your official communication are the real facts of the case.

It is obvious that, when the Attorney General proceeds to give his opinion and advice on any question of law, the facts giving rise to such question must be either stated to, or assumed by him; and when the head of the department calling for his opinion gives him those facts, he must necessarily adopt them as the bases of his reflection and judgment. Whether they are presented in the form of a direct statement, or of an argumentative examination of the circumstances, can make no difference. In either case, it would be manifestly improper to receive from any other source statements or inferences conflicting with those which are put before him by the only authority legally known to him in the premises. Its departure from official comity would not constitute the only objection to such a course; it would involve a usurpation of power; for it would convert an office created for the sole purpose of assisting and advising the executive department on questions of law, into an appellate tribunal for the re-examination of their decisions on matters of fact.

Guided by the foregoing considerations, I have only to ab-

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stract from your official communications of the 30th ultimo and the 6th instant such facts as are pertinent to the questions propounded to me, or as may be necessary to a correct understanding of my opinion.

The material circumstances are as follows:

Messrs. James Reeside, Richard C. Stockton, and L. W. Stockton, under the advertisement for mail contracts in 1831, offered to carry a daily mail from Baltimore and Washington to Wheeling in three days and four hours, for the annual pay of \$4,550. This offer, however, contained a proposition for an improvement—*i. e.* to run through in two and a half days; and to run also a tri-weekly line to carry the way-mails. This was agreed to by the department, and the service directed from the beginning of the contract, at an additional compensation of \$8,950. They were also directed to increase the speed, so as to run through in two days, at an increased compensation of \$6,750: thus making their annual compensation, when they entered upon the service, \$20,250.

They were afterwards authorized to transport the mail from Baltimore to Frederick upon the railroad, and an allowance (taking effect on the 1st of February, 1832) was made therefor, at the rate per year of \$2,046.

During the year 1832, the contractors charged and were paid according to the foregoing rates. In the winter of 1832-'33 it was alleged by them that, in consequence of the increased weight of the mail and the badness of the roads, they had been obliged, in order to get through in time, to employ extra horses and postillions, for which they claimed, and were allowed from the 1st of January, 1832, the annual sum of \$9,812; and at or about the same time they claimed, and were allowed, for raising the tri-weekly mail into a second daily mail, (the allowance to take effect from the 1st of January, 1832,) the further sum of \$6,400: thus making the annual pay of the contractors \$38,508.

At the end of the first quarter of the year 1833, the contractors for the first time charged and were allowed for extra horses and postillions, and for the second daily line, introducing an item for \$16,212 for the same services during the year 1832, which was passed to their credit; but the annual compensation

to which they considered themselves entitled at the close of the first quarter of 1833 is stated to have been \$38,508. The leading item now in controversy, as I understand, is an additional allowance of 50 per cent. on that sum, to take effect from the 1st of January, 1832—making an annual amount since that time of \$19,254. The history of this special allowance, as presented in your communication, is briefly this:

On the 27th of March, 1833, a letter was addressed by R. C. Stockton to the Postmaster General, stating that, in consequence of the increased speed on the Cumberland road, the great eastern mails, which had previously gone by other routes, had been thrown upon their route, and had so increased the weight and bulk of their mail as to render it impossible to carry it with the rapidity required, without making special extra provision therefor. He therefore prayed the Postmaster General to make them a special allowance, and said that, if an addition of 25 *per cent.* could be made to their compensation, they would instantly prepare for any emergency, either by running double lines, or increasing their stock, or by running separate vehicles. This compensation, he suggested, would but partially remunerate them for their necessary increase of expense, and they “trusted the department would conceive it but reasonable to grant it from the 1st of January;” by which date, as Mr. Stockton subsequently alleged, was intended the 1st of January, 1832.

The Postmaster General, by memorandum in writing at the foot of this letter, directed that the services should be required—“the question of compensation, and the amount of it, to be reserved for future consideration.” This decision was communicated to the contractors, by letter dated the 28th of March, 1833. In this letter the contractors were informed that the Postmaster General required that a full daily line of four-horse post coaches should be substituted for the tri-weekly line of post-coaches which they were then running: “that is, that you run two full lines—the fast and the ordinary one,” &c. A second daily line was afterwards run by them on the route.

On the 2d of June, 1833, another letter was addressed by R. C. Stockton to the department, adverting to the former letter, and the order taken thereon, and adding that they had

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since found that the increased weight of the mails so far exceeded what was supposed, that less than an allowance of 50 per cent. would be altogether insufficient to sustain them in the additional expenditure, and, therefore, praying an allowance of 50 per cent., and requesting that this letter might be attached to their former application.

It is alleged by the contractors that the then Postmaster General did at that time definitively allow this claim of 50 per cent. to take effect from the 1st of January, 1832, and did then also authorize its payment; and that it has constituted a portion of their regular receipts from the department ever since. But, after reviewing the evidence on this point, you have come to the conclusion that the allowances were kept under consideration, and were not actually made by your predecessor until the months of February and March, 1835, when he directed them to be passed to the credit of the contractors. And although certain advances were made by the department to the contractors, which may have been intended to be covered by these allowances when finally confirmed, yet you have also come to the conclusion that these advances must be officially considered as having been made on general account. Your decision, therefore, in respect to this disputed fact, is, that nothing has been paid on account of the allowances in question, either before or after they were ordered to be made. It also appears that the general account of the contractors in this case is still open, not having been settled in the Post Office Department since October, 1829.

Under these circumstances, you request my opinion on the two following questions:

I. How far the acts of your predecessor, in directing the allowances above mentioned, and in partially carrying them into effect, are conclusive on you? and,

II. If they are not conclusive, then whether any allowance whatever can be made under these contracts, for any increase in the weight of the mails?

I. In answer to the first of these questions, I have the honor to state that, in my opinion, the acts of your predecessor, directing the allowances above mentioned, are not conclusive upon you; that you have competent authority to look into those

allowances, and, in case you shall find them to have been founded on material errors of fact or of law, that you have not only the power, but that it will become your duty, to correct such errors, by reversing, either in whole or in part, as justice shall require, the proceedings in question.

I place this opinion on two grounds:

1. On the general principles of law applicable to the office and powers of the Postmaster General in all cases, and especially in cases like that now before me. And,

2. On the peculiar posture in which the acts in question were found by yourself when you entered on the duties of your office.

1st. By the 1st section of the post office law of 1825, it is made the duty of the Postmaster General, among other things, "to provide for the carriage of the mail on all post-roads that are or may be established by law, and as often as he, having a regard to the 'productiveness thereof, shall think proper;" and, also, "to pay all expenses which may arise in conducting the post office and the conveyance of the mail, and all other necessary expenses arising in the collection of the revenue and management of the General Post Office."

The 4th section authorizes him to enter into contracts, for a term not exceeding four years, for extending the line of posts; and the 10th section imposes the same limitations as to time on all other contracts for the conveyance of the mail.

The 43d section, by necessary implication, authorizes him to make additional allowances to contractors or carriers of the mail, over and above the amount stipulated in the contract, provided additional services shall have been required; and with the further restriction, that no additional compensation shall be allowed to exceed "the exact proportion of the original amount to the additional duties required."

The provisions which I have quoted impose on the Postmaster General duties of a very onerous nature; and the powers which are necessary to their faithful execution are either expressly, or by necessary implication, conferred upon him. These powers include a very liberal discretion in regard to the frequency of the mails, and the manner in which they are to be carried; and also as to the terms, in regard to compensation

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and other matters, of all contracts for those purposes. His discretionary powers in these respects are, for the most part, entirely undefined by any statutory provisions; but, though not expressly defined, their discretionary powers are necessarily limited by the acts of Congress establishing and regulating the department. They are also limited and controlled by the general law, in which it will of course be understood that I include the constitution of the United States.

The Postmaster General having authority to make contracts for the conveyance of the mail, all legal contracts duly entered into by him, and which are not tainted with fraud on the part of the contractors, or capable of being avoided by reason of material error of fact, are obligatory on the government, and of course conclusive on the Postmaster General who made the contract, and on his successor in office. And when such contracts are faithfully performed, they vest in the contractor a valid claim for the stipulated compensation, the payment of which cannot be causelessly withheld or delayed, without a breach of national faith. The same remarks may be applied to agreements or orders for additional allowances lawfully made in pursuance of the 43d section. Such allowances are, in truth, supplementary contracts; and when the additional services (for which alone they can be made) shall have been faithfully performed, the rights of the party will stand on the same footing as if the services and allowances had been expressly included in the original contract.

Every contract, whether original or supplementary, obtained from the Postmaster General by fraud of any kind on the part of the contractor, or made by the Postmaster General under mistake as to material matters of fact, is voidable, at the election of the government. This is the rule between individuals, when contracts made by them are affected by fraud or mistake; and it applies to the contractors of the government, with no other difference than that occasioned by the incapacity of the government to be sued. Its immunity in this respect will enable its agents, in all cases where the fraud or mistake has been detected before the payment of the money, to protect the interests of the public without resort to suit; but when the money has been paid, and it is desirable that the contract

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should be rescinded, that end can only be accomplished through the medium of the courts of justice. It is true that the terms on which the government will be relieved from such contracts by the courts, will be different in the two cases of fraud and mistake; but its right to be exonerated from the contract is as clear in the one case as in the other. The only difference is, that, when the contractor has been guilty of no misrepresentation or suppression of facts, or other fraud, the courts will see that he is fully paid for his services and expenditures, according to the contract, until it shall have been equally rescinded. But, as fraud vitiates every thing, the party who is guilty of it is entitled to no such immunity. He can claim nothing from his contract; he is only entitled to a reasonable indemnity for his services; and, from the amount which may be allowed to him, the damages and expenses occasioned by his misconduct are first to be deducted.

As the Postmaster General is merely the agent of the government, and has but a limited authority, it is only such acts as are within the scope of that authority, and conformable to law, that are obligatory on his principals. Every citizen is chargeable with a knowledge of the law; and all persons who make contracts with the Postmaster General must be presumed to be acquainted with the extent of his powers, and with his departure from them, where his contracts or other acts are contrary to law. No person, therefore, can rightfully claim any benefit, as against the government, under a contract or other act made or done by the Postmaster General in contravention of law. Every such act is wholly void, (or, as the lawyers express it, is void from the beginning,) and no legal right can be founded thereon.

It results, from the foregoing views, that moneys paid by the Postmaster General to a contractor, who obtains them by fraud, or through mistake as to material facts, or in cases prohibited or unauthorized by law, may be recovered back in a suit brought for that purpose.

The Postmaster General is not only authorized, in the cases above stated, to make contracts on the part of the government, but he is also the agent by whom the contract, so far as it imposes a duty on the government, is to be performed.

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The most important of those duties is usually that of making payment; and this is to be done by the Postmaster General.

The government cannot be sued on its contracts; and therefore its agents may withhold or delay payments, without subjecting their principals to the consequences usually attending such acts. The only remedy of the creditor, except where he has in his hands the moneys of the government, and is thus enabled to avail himself of a lien, or to drive the government to a suit in which he can have the benefit of a set-off, is by an appeal to Congress. This very circumstance, however, increases the obligation of the government to execute all lawful contracts duly made by its agents with promptitude and fidelity. The Postmaster General, and all other paying agents, should, in all fair and plain cases, act upon this principle. Payment should never be withheld, when in possession of adequate means, unless the officer be well satisfied, and on good grounds, that the money, if paid, could, for one or other of the reasons above mentioned, be immediately recovered back. But whenever the conviction is honestly entertained, that, by reason of fraud, or of mistake, or illegality in the contract, the moneys, if paid, could be reclaimed by the government; in every such case, the officer not only has the right, but it appears to me that it is his duty, to suspend the execution of the contract, by withholding payment, and to leave the party to his application to Congress. Such a step ought not, indeed, to be taken, except upon the clearest considerations of its justice and necessity; because, if it should chance to be ill founded, it might operate to the serious injury of an innocent party. But even where such an injury occurs, it is not to be deemed irreparable; the legal presumption being that Congress will do ample justice in the premises.

Although the act of Congress establishing and regulating the General Post Office recognises the fact, that the person holding the office of Postmaster General may die, resign, or be removed from office; and the powers and duties of the office may thus be devolved on another individual; it yet manifestly proceeds upon the principle that the duties of the office, by whomsoever it may be held, are at all times the same, and are always to be executed in conformity to the special requirements

and general principles of law. The incumbent of the office for the time being is clothed with all its powers, and charged with all its duties; and, in regard to all public matters, he, and he alone, is legally responsible. His own convenience, and the stability of administration, will usually be promoted by completing the unfinished determinations, and even the incipient designs, of his predecessor; yet he is not absolutely bound to carry them into effect. As a general rule, it will, no doubt, be best that he should do so; but, as to everything which rests *in fieri*—which is yet executory—he has a right to examine and to decide for himself. And if, on such examination, he should deem the proposed measures inexpedient, he is not obliged to execute them; nor is he authorized to do so if he finds them to be illegal. I am now speaking of those determinations and designs which may properly be regarded as exclusively public, and not acts or arrangements which also affect individuals, and under which private rights may have been acquired. The latter will hereafter be adverted to.

The daily recurring duties of the office are so multifarious and burdensome, that the public have generally no right to expect that a new Postmaster General will, immediately on his entrance into office, set about the task of examining the administration of his predecessor, with a view to the detection of errors in principle or in practice. Under ordinary circumstances, it will be a sufficient vindication of the new officer, especially in reference to acts done by him soon after his introduction into office, that they were either specially directed by his predecessor, or authorized by the general principles of administration established by him. But as the law of the land is the only true guide to the incumbent, he is bound, at the earliest practicable moment, to acquaint himself with its provisions; and whatever may have been the usage of the office, or the special arrangements of his predecessors, he must regulate his own conduct by this paramount standard. And, so far from imitating and acquiescing in those usages and arrangements without inquiry or reflection, he should seasonably compare them with the law; and if he finds them repugnant to it, he is bound at once to abrogate or modify them, so far as may be necessary to correct their illegality. The public, in every

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case, have a right to demand this from the new officer; and it is easy to conceive that, in some cases, it may become a duty more important than all others. But, though the Postmaster General has no authority to bind his successor in matters of purely public concernment, the case is different in respect to transactions with individuals. His contracts with them, whether original or supplementary, when made in the cases and manner authorized by law, and when not affected by fraud or material error, are, as already observed, obligatory on his successors. The change of the incumbent can in nowise affect or impair the rights of the individual contractor. A new Postmaster General cannot rescind or vary the contracts made by his predecessor; but this incapacity is occasioned by the obligatory force of the contract itself, and not by the accidental circumstance that it was made through the agency of another individual. If that individual had continued in office, he could not have varied the contract in the slightest particular, except when authorized by its terms or by the consent of the other party. And, in this respect, the new Postmaster General possesses precisely the same powers as his predecessor. Nor, on the other hand, can a change in the office impair or affect the rights of the government, in regard to private contracts, or the powers or duties of the agent to whom this branch of its affairs is committed.

But, although the contracts of the department with individuals cannot be abrogated or varied by the mere act of the government or its agents, yet, as they are liable to be avoided by the government whenever it can show fraud or material error to have intervened, its agents, (and especially the Postmaster General,) in order to render this right available, must have authority to inquire into the circumstances under which they have been made. And this inquiry may as lawfully be made by the new officer as by him who made the contract. The same reasons of necessity and convenience which have already been referred to as likely to induce a new Postmaster General to acquiesce, as a general rule, in the dispositions made by his predecessors in matters of a public nature, will, indeed, apply with even greater force to contracts with individuals; but, as the Postmaster General by whom any such contract was made

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had the undoubted power to re examine the subject, for the purpose of testing the accuracy of any complaint or suspicion of unfairness or illegality, and of verifying the truth of any material fact which entered into the contract, so also must his successor have the same power. The right to make this investigation belongs to the office, and not to the individual who may chance to fill it. And whenever the incumbent for the time being shall come to the knowledge, either by means of his personal investigations, or by information communicated to him by others, or in any other way, that any contract of the department is liable to any such objection, it is his duty to take such proper measures as circumstances may require, to protect the interest of the government in the premises. If the money has been paid, the proper remedy will be a suit in the appropriate tribunal: if the contract be yet unsatisfied, and the money unpaid, it would be idle and improper to make payment, for the mere purpose of enabling the government to maintain a suit to recover back the money. The simple and more appropriate course will be to stop short with the contract, and to refuse to make any further payment thereon. It is obvious that the remarks before made, as to the caution which should attend such a step, even when taken by the very person who entered into the contract, will also apply in this place, and with greatly increased force. But, in regard to the right, and, under certain circumstances, the duty of taking it, I cannot entertain a doubt.

The constitution declares that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." Whether the public moneys at the disposal of the Postmaster General are technically in the treasury or not, the spirit of this provision applies to them, and ought to be faithfully observed in their expenditure. In contemplation of law, every such expenditure must be considered as ordered by the head of the department at the time when it is made. It is true that the pressure of business must necessarily prevent a special examination in respect to each particular payment on each particular contract; yet, as the Postmaster General is exclusively intrusted with the care and application of the moneys of the department, the law presumes that he does so far examine

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and decide in respect to each disbursement as to make himself legally responsible therefor. And, accordingly, his accounts are to be rendered to the Auditor, and to be settled by that officer and the Comptroller, "as other public accounts." (General Post Office law of 1825, sec. 1.) To hold that an agent, whose powers are thus circumscribed, and whose appropriation of the public moneys is thus to be made the subject of account, can be authorized to pay over those moneys to a party whom he conscientiously believes to have no lawful claim to them, would not only be repugnant to the spirit of the constitution and of law, but to the first principles of reason and justice. It can make no difference, in morals or in law, that an order is to be found in the records of the department directing the payment to be made. If the officer is satisfied that there was no legal authority to make such order, or that it was obtained by fraud, or was made under erroneous impressions as to material facts, he is bound, by the very nature of his trust, to do what he can to correct the procedure, and to protect his constituents from any further mischief by means of it. The first and most obvious step is, to desist from applying the public moneys to a purpose which, if it be regarded by him in the light above mentioned, he must also see and feel is unauthorized by law.

The foregoing principles, as it appears to me, grow out of the general relation of principal and agent, as it exists under our constitution and laws, in this particular department. It only remains, before I apply them to the present case, that I should vindicate or distinguish them from the objections contained in the arguments on behalf of the contractors, transmitted to me with your communications.

It is contended that, as the Postmaster General is authorized to make contracts for carrying the mail, and also to decide whether additional services are necessary, and to agree on the compensation to be made for them, he has jurisdiction over the subjects; and that his decision, though erroneous, must be binding on the government and on his successor in office.

In support of this position, several adjudged cases are referred to, in which the distinction between erroneous and void judgments has been recognised; and in which the courts, acting on that distinction, have held that the decisions of tribu-

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nals, and of officers having jurisdiction over the subject-matter of such decisions, although admitted or supposed to be erroneous, were yet, for many purposes, held to be valid and conclusive. And in order to bring the present case within the principle of those decisions, we are reminded that it is the doctrine of the Supreme Court of the United States, and the understanding and practice of all the departments of the government, to consider the contracts, decisions, and proceedings of the head of a department conclusive upon the particular department, unless material errors or new and important facts have been subsequently discovered; and also conclusive as against the government, except when impeached in a court of justice, on the ground of fraud or mistake.

To support this latter suggestion, the cases of the *United States vs. Jones*, (8 Peters, 375,) *United States vs. Macdaniel*, (7 Peters, 1,) *United States vs. Fillebrown*, (7 Peters, 29,) and *United States vs. Randolph* (9 Peters, 12,) the arguments of the Attorney General in several of those cases, and the official opinions of that officer and of the Secretary of War, in cases presented for their decision, are appealed to by the counsel. But it is due to them to state that this part of their argument was founded on the assumption that the decision to consider the services in question as additional services, and to require them to be performed, was definitively made in June, 1833; the compensation then fixed and ordered to be allowed; the money actually paid, and the allowance entered on the books to the credit of the company. In all these particulars, the statements and conclusions in your official communications are different from those of the counsel; and as I have felt myself bound to adopt your version of the facts as the correct one, the arguments and the authorities are for the most part inapplicable. Besides, several of the most important cases relate to departments organized on principles and proceeding in a manner very different from those prescribed for the General Post Office. Still, I recognise the general accuracy of the doctrine above stated, and of the decisions and opinions referred to; and do not intend to lay down any principle which shall conflict with them.

It will also be perceived that the arguments referred to me

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fully admit that allowances made by the head of a department, which have been actually paid, and which have even gone into accounts settled by the accounting officers of the treasury, may yet be judicially re-examined in cases of fraud, or mistake as to material facts, and the money obtained by means thereof be recovered back by the government. They further admit, either expressly or by necessary intendment, that the head of a department, who has ordered a special allowance, has a right to modify, correct, or withdraw it, at any time before it has been acted on and passed by the accounting officers, and entered on their books.

The preceding observations would be sufficient, I think, to dispose of the whole argument founded on the distinction between acts that are void for want of jurisdiction, and those that are only erroneous and voidable for error in the exercise of powers really possessed. But as it appears to me that this principle is only to a very limited extent applicable to the proceedings of the Post Office Department, I shall endeavor to point out what I conceive to be an erroneous use of the distinction referred to, in the remarks of the counsel. To do this with accuracy, the reason and design of the rule must be carefully borne in mind; and we must also take it in connexion with certain other rules, equally well settled, and equally applicable to subjects of this nature. The rule in question relates chiefly, if not exclusively, to the decisions of courts and of officers acting *judicially*; and is founded on the regard which the law pays to the intrinsic difficulties of the judicial function and to the fallibility of human nature. Knowing the arduousness of many of the duties which devolve on the officer, and his liability to fall into mistake, the law, which never demands impossibilities, merely requires that he should confine himself within his legitimate sphere, and act with integrity and ordinary care. If he has jurisdiction, and only errs in the exercise of it, his acts are not void, but only *voidable*. The great purposes of the rule are, to shield the tribunal or officer from personal responsibility for mere error of judgment; to protect the ministerial officers by whom the judgments and other acts of judicial tribunals, or officers acting judicially, are to be executed; and to prevent injustice to pur-

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chasers and other third persons, who have innocently reposed confidence in the validity of the proceedings. So long as the decision was clearly within the jurisdiction of the officer, third persons will be protected, whatever may have been his errors in judgment, or his impurity of motive; and if there be no impurity of motive, the officer himself will also be irresponsible. For all these purposes, it is in many cases necessary that the official proceedings, even though admitted to be erroneous, should yet be deemed *valid* until duly reversed; and that they should not be reviewed collaterally, nor in any mode or by any authority than such as is appropriate and competent to their reversal.

But this rule does not imply that such proceedings are perpetually conclusive and irreversible. On the contrary, it admits that the decision, if erroneous, is liable, in due form of law, to be reversed; but it will not allow even such a decision to be impeached collaterally. And it is only while it remains unreversed, that it is to be regarded as valid, or that parties and third persons can be protected by it. All acts done after any such decision shall have been regularly reversed, stand on the same ground as if it had never existed, or as if it had been void from the beginning.

Where tribunals or officers undertake to act in matters over which they have no jurisdiction whatever, their proceedings are *void* from the beginning. And even where they have jurisdiction over the subject, yet, if they entirely depart in their proceedings from the positive requirements of law, such irregular proceedings are considered absolutely *void*, and not merely *voidable*. Irregularities of this nature are not regarded as mere errors of judgment—mere mistakes in ascertaining the rules of law, or in applying them judicially; and, therefore, they are not viewed with the indulgence, nor entitled to the immunities, which are extended to such errors and mistakes. On the contrary, they are looked upon as excesses of jurisdiction. Indeed, so far as the particular acts are concerned, there is a want of jurisdiction to perform them, and they are therefore justly involved in the general consequences of such a defect.

After this explanation of the doctrines referred to, it will be easy to show that they do not conflict with either of the general principles on which I rely.

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The contracts of the Postmaster General, and the decisions and orders made by him within the scope of his general powers, however erroneous, are undoubtedly valid, so far as to protect the subordinate and ministerial officers of his department who may carry them into execution, until reversed by competent authority. Nor will the Postmaster General be responsible for any error of judgment, however injurious it may be to the public interest, so long as he confines himself within his legitimate sphere, and acts in good faith and with ordinary care. All this is perfectly consistent with the views above taken; or, rather, in the statement of those views, these principles were remembered and taken into account. But even in cases where the Postmaster General has undoubted jurisdiction, he may yet commit error; and, though his decision be ever so definite and positive, and though it be reduced to writing, and recorded in the most solemn manner, it is still liable, if erroneous, to be reversed. This must be admitted, even in those cases to which the rule above mentioned plainly applies; it is involved, as has been shown, in the principle of the rule itself. The question then arises—How, and by whom, is the correction to be made? By what officer or tribunal is the erroneous decision (which all will admit must be corrected somewhere) to be reviewed and reversed? On this point, the distinction referred to, and the numerous cases cited by the learned counsel for the contractors, in which it has been illustrated, shed no light whatever. But if the observations hereinbefore made on the nature of the agency intrusted to the Postmaster General, and on the constitutional and statutory provisions which apply to it, be well founded, we are then authorized to say, that whenever the Postmaster General satisfactorily arrives at the conclusion that any contract, decision, or order of the department, no matter where or by whom made, is erroneous in point of law, or founded on fraud or material error, he is not only authorized, but bound, so far to reverse it as to suspend and refuse any further appropriation of the public money to the purposes of such contract, decision, or order. As to payments and other acts actually and definitively made and done under such erroneous decision, they must stand until corrected by the appropriate judicial tribunals; but, as to all further proceedings, the

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Postmaster General may, as it seems to me, either act or refuse to act, as in his judgment the law of the case and his duty to his constituents shall require.

The principles above stated, though sufficiently comprehensive to embrace all cases, may be applied with more safety, and with less danger of injustice or abuse, in some instances than in others. The particular acts of your predecessor, now in question, are of this character. They do not belong to the ordinary business of the department, but to a particular class of cases in which only very limited powers are given to the Postmaster General, and in which there is also considerable room for imposition on the one side, and for mistake on the other. This portion of his powers is also regarded with some jealousy by the representatives of the people; and the manner of exercising it is, consequently, the subject of more rigid scrutiny than perhaps any other branch of his important duties. It is also a part of the history of the country, that the propriety of such allowances as were made in the present case has, for several sessions of Congress, been made the subject of investigation by committees, and discussion on the floor; and that in a bill concerning the Post Office Department, which passed one house during the last session, several special provisions were inserted for the purpose of circumscribing and regulating, by new guards, the exercise of this power. The allowances in question amounted to a very large sum, and were moreover among the last acts of the late head of the department. Under these circumstances, it appears to me, that if any doubt could exist as to your authority to look into the merits of the ordinary proceedings had by the department before your appointment, no well-founded doubt can exist as to the possession of such authority in cases like the present.

2d. The posture in which this matter stood at the time you came into office is also deserving of much consideration.

It appears from your statement of facts that the orders for these allowances were not made until February and March, 1835; and that nothing, either before or afterwards, had been definitively paid on account of them. The additional services performed in this case prior to February, 1835, whatever they may have been, could not have been rendered in consequence

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of these orders. The case is, therefore, for the most part, free from the embarrassment and difficulty which would exist had the services been performed on the strength of those orders. And as the money has not been definitively paid on account of these allowances, nor the general account finally adjusted, I conceive that the orders must yet be considered unconsummated, and therefore peculiarly within the control of the present head of the department. Considering, indeed, the peculiar circumstances of this case, and, to my mind, it is not at all doubtful that the paying of the amount, or the confirming of the credit to the contractors, if this should be now done, would be officially and morally the act of the present incumbent. If he is to be responsible for the consequences, surely he must be authorized to exercise his own judgment as to the course to be pursued.

This leads me to notice the discussion which has been had between the counsel for the contractors and yourself in regard to the powers of the Postmaster General in the settlement of accounts. I do not consider it necessary for my present purpose to enter into a very extended examination of this subject; but, as it is one of considerable importance, and as you have particularly requested my opinion in respect to it, I will proceed to lay it before you, with the general reasons on which it is founded.

The Postmaster General is not only charged with the collection and care of all the moneys accruing to the post offices, but he is also a disbursing agent, and, as such, invested with a wide and very liberal discretion. Whenever the exigencies of his department require the employment of individuals, or the performance of any service, he is authorized to contract with such individuals, and to cause such services to be performed. He is empowered to settle the accounts growing out of such transactions; and out of the receipts of the post offices, and such other means as may be placed in his hands by Congress, he is to pay the sums which he shall find due on such accounts, and all other expenses of the department. In making those payments, the Postmaster General acts, to a considerable extent, at his peril; because the 1st section of the act of 1825 expressly provides that he shall, once in three months, render

to the Secretary of the Treasury "a quarterly account of all the receipts and expenditures of the department, to be adjusted and settled as other public accounts." (See also section 41.)

The 4th section of the act of the 3d of March, 1817, makes it the duty of the Fifth Auditor "to receive all accounts accruing in or relating to the General Post Office; to examine them; and to certify the balance, and transmit the accounts, with the vouchers and certificates, to the First Comptroller, for his decision."

The effect of these provisions is to subject the Postmaster General to a legal accountability for all the moneys received in his department. They must be charged to him by the Fifth Auditor; and he can only be discharged by the allowance of credits for expenditures made in the department, and proved by competent vouchers rendered in his behalf. But it does not appear to me that the intervention of the accounting officers of the treasury is at all necessary to the settlement of the accounts of contractors and other persons having demands against the department, so as to authorize them to require, and the Postmaster General to make, payment of such demands. As between the creditor of the department and the department itself, it is the duty of the latter to examine and adjust these accounts, without unnecessary delay, and, so soon as the result can be satisfactorily ascertained, to pay to the creditor the balance which may be due him. It is true, as already suggested, that this course may subject the Postmaster General to some peril; but I cannot doubt that the hazard is one which belongs to his office as now organized by law.

In regard to the precise manner of his accountability, there is, doubtless, some room for diversity of opinion, or, at least, for various interesting questions. Is he entitled to credit for every expenditure which he may show has actually been made by him in his department? Are the accounting officers of the treasury obliged to pass to his credit, without inquiry or reflection, every such expenditure? On the other hand, is he to be held to the same rigid accountability to which inferior disbursing agents—such, for example, as army paymasters or navy pursers—are usually subjected? If the latter is the case, I think few discreet men would be willing to assume the bur-

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den and hazards of the office; and this furnishes a good reason for believing that Congress could never have designed so strict a construction. But, then, if the accounting officers are to limit their inquiries to the mere fact of payment, without examining into the legality of the expenditure, the accounting will not be such as is required in the other cases. We must, therefore, seek for some rule of interpretation which shall avoid both these extremes.

The true meaning of that part of the statute which declares that the accounts of the Postmaster General shall be "adjusted and settled as other public accounts," is, I apprehend, that the same principle shall be applied to his accounts which is prescribed and sanctioned by law and usage for the settlement of accounts of other public agents whose powers are analogous to his. The liabilities of paymasters and pursers, and of other subordinate disbursing agents, whose duties are defined by law, and who are not intrusted with discretionary powers, are not a fit standard by which to measure his responsibility. The public accounts which are most analogous are those of the agents employed by the heads of the other executive departments to disburse the moneys appropriated for the contingent expenses of such departments. In all these cases, the accounting officers are only authorized to look to the general nature and object of the expenditure. If it is one which really belongs to the contingent expenses of the department, they must, as a general rule, pass it to the credit of the officer. Whether it was discreet to incur any such expense in the particular case, and whether or not the amount of the expenditure was reasonable or excessive, are questions with which, in ordinary cases, the accounting officers have nothing to do. The head of the department, through the agent employed by him, is the appropriate judge on both points; and so long as the officer or agent acts in good faith, and with ordinary care, he cannot be held responsible for any error of judgment. But, if he applies moneys appropriated for the contingent expenses of the department to purposes not authorized by law—above all, if he applies them in a manner and to purposes forbidden by law—they cannot be passed to his credit. The accounting officers, in every such case, must disallow the credit claimed,

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and hold the officer or agent responsible for the balance found against him. In very gross cases, an expenditure, though for a legitimate purpose, may be considered as coming within the same principle so far as to authorize the accounting officers to reduce the credit within reasonable limits. But this can only be done where there is a palpable abuse of discretion; because the head of the department, and not the accounting officer, is the person to whom the discretionary power, so far as it can be lawfully exercised, has been exclusively committed.

These, as I understand, are substantially the principles observed in the accounting offices in the settlement of accounts for contingent expenses; and these are also the principles which, as it appears to me, ought to be applied to the general accounts of the post office. In so applying them, the accounting officers will allow to the Postmaster General every expenditure made for his department for any lawful purpose, without regard to its amount or to the wisdom of incurring it. For example: whether or not it was expedient to cause a daily mail to be transported on a given route; whether, on another route, it would have been judicious to employ a weekly instead of a semi-weekly one; whether the compensation agreed to be paid, in any particular case, was too much or too little; whether it was necessary and prudent, in a case like that under consideration, to call for additional services, involving the necessity of making large extra allowances beyond the original contract; and all other questions of this nature are matters with which the accounting officers have no concern. They belong necessarily and exclusively to the Postmaster General.

But, whenever the accounting officers can see, by the face of the account, or by the vouchers produced in its support, that moneys have been paid by the Postmaster General in cases or for purposes not authorized by law; and, still more, when they perceive that such payments were directly contrary to law, it will be their duty to disallow them, and to hold the Postmaster General a debtor to the government for the amount. In the case of moneys paid for additional allowances, a rule is given by the act of Congress, which the accounting officers may and ought to apply to every credit of this nature claimed in the account. If they discover that the rule prescribed by law has

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been violated in the allowance, I do not see how they can pass the payment to the credit of the Postmaster General, without a palpable dereliction of duty.

If this view of your responsibility in the accounting office be correct, there would seem to be little room for doubt as to your right to inquire into the grounds on which the unconsummated orders in question have been made, and to affirm or reverse them, as the law and justice of the case shall in your judgment require.

For each of these reasons separately, and for both combined, I am satisfied that the answer above given to your first query is the only one which can possibly be made to it.

II. The answer to be given to your second question depends partly on the terms of the contract made in the case, and partly on the construction which shall be given to the 43d section of the act organizing the General Post Office.

The contract, as you state it, is "*to carry the mail of the United States*," without any stipulation in favor of either party as to its weight.

Under such a contract, I apprehend that the contractors are bound to convey the whole mail accruing between the *termini* named in the contract, or coming into it from other routes, according to the arrangements contemplated when the contract is made, as such mail may chance to exist from time to time, and at all times, during the contract. They are bound to remember, where the contract is for so long a period as four years, that the mail will naturally increase in weight during the term; and it is, therefore, to be presumed that their proposals are made with reference to such increase. Upon any construction of the 43d section which the words will bear, I do not see how the increased weight of the regular mails from Washington and Baltimore to Wheeling, as above specified, can be considered as an "*additional service*" within the meaning of that section. If the weight of such regular mails has been increased during the existence of this contract, to an extent which could not reasonably have been foreseen at the time when the contract was made, there may be just grounds for applying to the liberality of Congress for a special allowance; but it is very plain that the Postmaster General cannot

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make any such allowance, without a palpable infraction of the 43d section. The "*additional service*" provided for in that section must have been "*required*" by the Postmaster General as something beyond and out of the original contract; whereas this service is the very thing which the contractors, at the very beginning, engaged to perform. The additional compensation to be allowed for such new service cannot exceed "the exact proportion of the original amount to the additional duties required;" but, as the original amount has no reference whatever to the weight of the mails, it is impossible to make any such compensation, or to ascertain any such proportion, as the law demands.

I am not so well satisfied that an allowance might not be lawfully made for an increased weight of the mail, so far as such increase was occasioned by the turning into this mail, after its speed was accelerated, of other and additional mails from slower routes, not expected to be carried in it when the contract was made. The observations quoted by you from the report of the committee of the House of Representatives, "that the obvious and natural result of giving an accelerated speed to any one route is to attract to it packages from slower routes; and that this also is one of the consequences which ought to be foreseen by the contractors, and, if they think it important, guarded against in their proposals;" are probably correct, provided the contractors are also bound to know that the department will leave the other mail-routes in their then existing state. But may they not reasonably presume that the same desire to promote the public accommodation, which prompts the department to give increased speed to the mail on one great route, will also induce it to give correspondent increase of speed to all the other great routes? And is there not some plausibility (to say the least of it) in the argument, that when the party contracted to carry the mail of the United States from Washington and Baltimore to Wheeling, he and the department must both have intended the usual and regular mail, according to the course then pursued, or expected to be pursued, between those points; and that neither could then have contemplated the doubling or trebling of its weight by the diversion of an independent mail then carried, and expected to be

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carried, on a different route? And if such was really the understanding of the parties when the contract was made, may we not say, that when the Postmaster General directed the mail from the Philadelphia and Pittsburg route to be carried by these contractors, he required of them "an additional service," and one for which they were justly entitled to additional compensation? I am so strongly inclined to answer these questions in the affirmative, that I should probably give them such a reply, did I not perceive another difficulty in the way. As I have already suggested, the 43d section forbids any additional allowance in any case in which the additional service required cannot be compared and measured with the original amount; and even, therefore, if it were admitted that the service in question was an additional service within the spirit of the law, it would yet be excluded from its benefits; because it is utterly impossible to make the comparison, and to ascertain the proportions which are indispensable to bring the case within the terms of the provision. There is, therefore, no remedy except by an appeal to Congress; but if the facts are correctly stated by the contractors, it appears to me they have strong claims on the justice of Congress for a liberal allowance in this respect.

There are one or two other remarks on this branch of the case, which are necessary to put you fully in possession of my views in relation to it.

1. Where the contract is to carry the mail in a particular vehicle and by a particular number of horses; and the mail, during the continuance of the contract, becomes so far increased in weight, either by the increased business done on the original route, or by attracting packages from other routes, that it cannot be carried in the vehicle and by the horses mentioned in the contract, but an additional vehicle or an additional horse or horses become necessary, and are therefore required by the department;—this, I think, is an "additional service" for which a proportionate allowance may lawfully be made.

2. Although no particular vehicle or number of horses be mentioned in the contract; yet, if the mode of conveyance, and the strength to be employed, were mentioned in the proposals, or were otherwise clearly understood by the parties when they entered into the contract, I think the case may well

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be considered as standing on the same ground with the one just mentioned.

You will observe that I speak without reference to passengers. So long as the mail can be carried in the vehicle and by the force specified in the contract, or otherwise contemplated by the parties, I think the contractor is bound to carry it, even though it may compel him to diminish the number of his passengers, or even to exclude them altogether, unless the right to carry at all times a certain number of passengers is specially reserved to him in the contract.

As I understand the present case, the mail was never increased to so great an extent but that it could be conveyed in the vehicles and by the force contemplated in the contract; and on this supposition, I answer your second question, with the qualifications above stated, in the negative. If, however, I am wrong in this impression, and you concur in the two suggestions just made, you can readily apply them as the facts of the case may require. On the other hand, if I am right as to the fact, and have taken a correct view of the general powers and duties of your department, and of the 43d section of the act concerning it, it will follow that the order of the Postmaster General, authorizing an additional allowance for the increased weight of the mails, was void from the beginning, because made in contravention of the section referred to. And, unless Congress make provision to the contrary, it will also follow that the order in question cannot protect the contractors in the retaining of public moneys supposed to have been paid, or even actually paid, on this special account. As the case now stands, and on the principles of the foregoing opinion, all such moneys, whether paid before or after the issuing of the order, having been paid by the department and received by the contractors contrary to law, may be recovered back, in an appropriate suit to be instituted for that purpose.

I am, sir, &c., &c.,

B. F. BUTLER.

To the POSTMASTER GENERAL.

Conflicting Claims to Land—Construction of Act Feb. 19, 1831.

CONFLICTING CLAIMS TO LAND—CONSTRUCTION OF ACT OF
FEBRUARY 19, 1831.

The third section of the act of the 19th of February, 1831, does not confer the right of purchase and consequent title to the widow and children of A. Follin, deceased, to the exclusion of his assignee, claiming under the provision of the second section of the act of February, 1831, and 19th of February, 1833.

OFFICE OF THE ATTORNEY GENERAL,

December 5, 1835.

SIR: In your communication of the 28th of October last, after referring to me sundry papers relating to the conflicting claims of the assignee, and of the widow and heirs of A. F. Follin, deceased, recently pending before the register at Demopolis, you request my opinion on the following question, supposed to be involved in that case:

“Does the 3d section of the act of the 19th of February, 1831, confer the right of purchase and consequent title to the widow and children of A. Follin, deceased, one of the persons who became entitled to an allotment of land under the act of Congress approved 3d of March, 1817, and contract made in pursuance thereof, to the exclusion of the assignee of Follin, claiming under the provision of the 2d section of the act of February, 1831, and 19th of February, 1833, but who was not in the actual occupancy and cultivation of the land in controversy at the time of the passage of the act of 1831?”

I have looked into the several acts of Congress referred to, and, after a careful examination of their various provisions, am of opinion that the question proposed by you must be answered in the negative.

Although the act of 1817 declares that no patent shall be granted for the lands, nor any title be obtained therefor, either at law or in equity, until complete payment shall have been made for the whole four townships, and until the parties comply with the conditions of the contract authorized to be made under that act, yet, as soon as the contract was duly made, and the first conditions complied with, so far as to entitle any person to an allotment in the tract set apart by the Secretary of the Treasury, such person acquired an interest in the lands allotted to him. As it could make no difference to the government by what individual the conditions were fulfilled, pro-

 Payments to Executors who have Assigned.

vided they were faithfully executed, I perceive no reason to doubt that the interests thus acquired were assignable. They are accordingly so treated in the 1st and 2d sections of the act of 1831. The 3d section of that act must be construed in connexion with the two former; and, to be consistent with them, we must understand the section either as not particularly limited to the person who becomes *originally* entitled to the allotment, or, if it be so limited, then as not extending to those who had assigned their interests. If the former of these constructions be adopted, then the section does not apply to the present case; because, though Follin, the original proprietor, is dead, without having performed the conditions, his assignee is not. And if the other construction be adopted, then also is the section inapplicable; because, there was in this case an assignment by Follin in his lifetime.

On the construction which I have thus given to the act of 1831, there is nothing in that act which, under the circumstances of the case, as assumed in your question, can confer the right of pre-emption on the widow and children of Follin; and if this be so, then the act of the 19th of February, 1833, is, when taken in connexion with the former law, decisive of the question proposed to me.

It is, perhaps, scarcely necessary to add, (though I do it, to prevent any misconception in this respect,) that this opinion is given on the above question as you propose it, abstractly, and on the supposition that all the facts assumed in it are essential parts of the case referred to me.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

 PAYMENTS TO EXECUTORS WHO HAVE ASSIGNED.

Where there is a conflict of claims between an executor and his assignees for an award of moneys by the Third Auditor to the decedent, the treasury officers should pay the same to the executor, who is the legal representative.

Where assignments in due form are presented, and no objection is made to the right of the assignee, it may be paid to him.

OFFICE OF THE ATTORNEY GENERAL,

December 7, 1835.

SIR: I have considered the documents referred to me with your letter of the 27th ultimo, in relation to the conflicting

 Endorsees and Holders of Treasury Drafts.

claims of the executor of George Stiles, deceased, and the assignees of such executor, to the moneys awarded by the Third Auditor of the Treasury, under the acts of Congress and resolution therein referred to. The executor, being the "legal representative" of the owner, is *prima facie* the person entitled to receive the money from the government; and though, in all such cases, where assignments have been made in apparently due form, and no objection is made to the right of the assignee, it would be proper to make payment to the assignee; yet, whenever the validity of the assignment is impeached, and conflicting claims exist, it is undoubtedly the safest course to pay to the person legally entitled, and to leave all parties having equitable claims to their appropriate remedies in the courts of justice.

Whether, in the present case, it might not be just to retain the moneys until the parties claiming under assignments from Mr. Stiles can have opportunity to obtain the decision of a competent tribunal on the validity of their claims, is a question of discretion, which it belongs exclusively to your department to determine.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

 ENDORSEES AND HOLDERS OF TREASURY DRAFTS.

If a third person receive a treasury draft, in due course of business, for a valuable consideration, with proper endorsements, and without suspicion that the payee, or any bearer thereof, parted with it unlawfully or improperly, he has a claim upon the government for its amount.

But if such third person have any notice that the draft was issued for public purposes, and intrusted to an individual to present at the bank and receive the money thereon for the army, and had lost it by gambling, or some similar misconduct, such notice defeats his claim upon the government.

OFFICE OF THE ATTORNEY GENERAL,
January 18, 1836.

SIR: It appears, from the papers accompanying your letter of the 16th instant, that, on the 2d of September, 1834, two warrants were drawn in due form by the Secretary of the Treas-

Endorsees and Holders of Treasury Drafts.

sure on the Treasurer of the United States—the one requiring him to pay to Lieutenant R. D. C. Collins, assistant quartermaster at Fort Gibson, Arkansas, *or order*, the sum of \$1,500; and the other requiring him to pay the same officer, *or order*, the sum of \$1,000. At the foot of these warrants, drafts were drawn by the Treasurer on the cashier of the Union Bank of Louisiana, at New Orleans; each directing him to pay “the above warrant agreeably to its tenor.”

These warrants and drafts, after having come to the hands of Lieutenant Collins, were each of them endorsed by him in blank, in the following manner: “R. D. C. Collins, lieutenant, assistant quartermaster;” and thereupon delivered by him to Lieutenant Johnson, also an assistant quartermaster, for the purpose of being taken by him to the city of New Orleans, and there collected for the public service, with other similar warrants and drafts payable to his own order. Johnson, on his journey, fell among gamblers, who won from him about \$12,000 in public warrants and drafts, including, among others, the two above described. Information of this fact being received by the quartermaster’s department, payment of the drafts in question was stopped at the bank. L. C. Morrill, of Arkansas, who is now the holder of the two drafts above mentioned, and who alleges that he received them “in a fair business transaction, and paid the full amount thereof,” having caused them to be presented at the bank, and not receiving payment thereof, now applies therefor to the department; and in this state of facts, you ask whether, in my opinion, the United States are liable for the payment of these drafts?

Instead of making any positive reply to this question, (which, for the want of full information in regard to the usual manner of transmitting such drafts, and more especially as to the time when, and the circumstances under which, the drafts in question were received by Mr. Morrill, I cannot now give,) I will state the general principles of law by which, as I suppose, cases of this sort must be governed; leaving it to the department to apply them to the facts of this case, when they shall come to be sufficiently ascertained.

The drafts being payable “agreeably to the tenor” of the warrants to which they were subjoined, which warrants were

Endorsees and Holders of Treasury Drafts.

payable to *order*, must, as I conceive, be regarded in the same light as ordinary checks on a bank payable to order, and negotiable by endorsement merely; unless, by the general practice of the treasury, and of the deposit banks, some special formality is required for their negotiation. I have no reason to suppose that any such formality is required; and if not, then the endorsement of Collins, the payee, would have been sufficient to authorize the payment to Johnson, for the use of the United States; and it would also have been sufficient to transfer the title in the drafts to any third person receiving the same from him in good faith and for a valuable consideration.

The gamblers to whom the drafts were passed by Johnson could not recover the amount, because they received them on an illegal consideration, and from a person who, as they must have known, had no authority to pass them away, except for the public service.

But a third person, who may have received these drafts fairly, and on good consideration, without notice of the misconduct of Johnson, or of the illegality of the transfer, will, if the endorsement was in the usual and proper form, be entitled to demand the amount of them. In such a case, the law prefers that, of two innocent persons, the maker of the draft, who, by his own negligence or undue confidence in the payee, enabled him to put the draft afloat, should sustain the loss, rather than the innocent purchaser.

It is only necessary to add, in regard to *notice*, that any circumstance which is sufficient to put a party on inquiry, or to excite suspicion in the mind of a person of ordinary care, as to the validity of the endorsement, will in law be constructive notice, and sufficient to defeat the title of the holder. Whether anything of the kind exists in this case, does not appear from any of the documents before me; but I should think it very proper to look narrowly into the matter before payment is directed to be made.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

The three Pottawatomie Treaties.

THE THREE POTTAWATOMIE TREATIES.

The three treaties of 1832 with the Pottawatomie Indians may be considered as forming one transaction; and, except where special provision is otherwise made, the lands agreed by any one of them to be granted by the United States to individuals may be located within the limits of the cessions made by any one of the three, provided the party entitled to the grant assents thereto, and the President so directs.

ATTORNEY GENERAL'S OFFICE,

January 26, 1836.

SIR: In your communication of the 19th ultimo, after calling my attention to the three several treaties made with the Pottawatomie Indians, on the 20th, the 26th, and 27th of October, 1832, and stating the circumstances which led to so many separate instruments, you request my opinion on the question, "Whether the terms of the third article of the treaty of October 27, (a large portion of the parties to which are also parties to the treaty of October 26,) require that the lands it grants to individuals shall be located within the limits of the cession made therein, and forbid their location within the limits of the cession by the treaty of October 26."

Under the circumstances stated in your letter, and appearing on the face of the treaties themselves, I think they may all be considered as forming one transaction; and that, except where special provision is otherwise made, the lands agreed by any one of them to be granted by the United States to individuals, may be located within the limits of the cessions made by any of the three, provided the party entitled to the grant assents thereto, and the President of the United States so directs. With these qualifications, I am of opinion that your question may be answered in the negative.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

HON. LEWIS CASS,
Secretary of War.

Chickasaw Reservations.

CHICKASAW RESERVATIONS.

A widow keeping house, and having children or other persons residing with her, is the head of a family, within the meaning of the fifth article of the treaty. If her children, or other persons residing with her, however, are provided for in the sixth or eighth articles, they cannot be included in the family enumeration.

Widows keeping house without children or other persons residing with them, are, if they own slaves, entitled to the section, or half section, given by the fifth article, according to the number of their slaves.

ATTORNEY GENERAL'S OFFICE,
February 5, 1836.

SIR: I have examined the various provisions of the treaty with the Chickasaws of May 24, 1834, referred to in your letter of the 30th ultimo, for the purpose of replying to the question therein proposed.

After comparing the several parts of the treaty with each other, and considering the general design of its provisions, I am of opinion:

1. That a widow keeping house, and having children or other persons residing with her, is the head of a family, within the meaning of the fifth article.

2. That if the children or other persons so residing with such widow are provided for under the sixth or eighth articles, they cannot be included in the family enumeration; and, consequently, that a widow keeping house, without children or other persons being with her, not provided for in other articles, except slaves, is not embraced by that part of the fifth article which gives to heads of families the four, three, or two sections, according as the number of such families consists of ten and upwards, of five or upwards, or of less than five.

3. But that a widow keeping house under the circumstances last mentioned, by being the head of a family, is notwithstanding entitled, if she own slaves, to the section or half section, according to the number of her slaves, given by the fifth article.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER,

HON. LEWIS CASS,
Secretary of War.

MONETARY CHARACTER OF VIRGINIA LAND SCRIP.

Virginia land scrip is so far representative of money as to be subject to the same equitable deductions, in case of indebtedness to or frauds committed upon the government, as may be made in the case of a sum of money from the government to one of its debtors.

ATTORNEY GENERAL'S OFFICE,
February 9, 1836.

SIR: It appears, from your communication of the 12th ultimo, that Holman Rice, being entitled to a Virginia land warrant, covenanted with T. Triplett to allow him one-third of what scrip he might obtain, for his services in procuring it; that T. Triplett employed John S. Barbour, esq., to assist him, and assigned to him 400 acres of the amount obtained for H. Rice, and received a warrant for Rice for the residue, amounting to 3,600 acres, which he (Triplett) filed in the General Land Office; and that the proportion to which Triplett (under agreement with Rice) is entitled, amounts to 933½ acres; that Triplett, on forged papers, had received from the department \$13,422 52; of which forgery he was convicted at May term, 1835, in the district court of Kentucky; that suits for recovery of the money are now pending; and that there is no reason to expect that any property can be found, out of which the amount he has illegally obtained can be realized.

Under these circumstances, you inquire whether the scrip, to which Triplett is entitled in this case, can be deducted for the benefit of the United States.

It also appears that three powers of attorney from H. Rice are presented; in respect to which you ask whether the latter one revokes the others, and authorizes the department to deliver the scrip belonging to Rice to Mr. Todd, the attorney therein named.

The provisions of the act of Congress under which the scrip in question issued, the form of the scrip, and the uses to which it may be applied in the purchase of public lands, authorize us to regard it as a sort of representative of *money*; and I think it, therefore, subject to the same equitable deductions as would be made in the case of a sum of money due from the government to one of its debtors. Triplett, so far as the 933 acres

Pensions to Widows.

are concerned, is the real owner of the scrip; and I am accordingly of opinion that your first question must be answered in the affirmative.

The power of attorney to Triplett, dated in August, 1832, and the power to Mr. Sevier, dated in May, 1834, were both clearly revocable at the pleasure of Rice, except as to the rights acquired by Triplett under his contract; and I am accordingly of opinion that the power to Mr. Todd, dated in June, 1834, revoked the former powers, and authorizes the delivery to him of the scrip belonging to Rice.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

PENSIONS TO WIDOWS.

Pensions to widows must be applied for during widowhood; if they neglect to apply for them before their marriage, they are concluded.

OFFICE OF THE ATTORNEY GENERAL,
February 9, 1836.

SIR: In your letter of the 26th ultimo, you state the following case for my opinion:

"During the last war with England, an individual was killed on board of a private armed vessel of the United States in an action with a British ship. His widow did not apply for a pension. She married again; but the second husband, during her life, did not prefer the claim. After her death, he demanded the pension from the date of the first husband's death to the time of her second marriage. The woman had no children."

On this case, you inquire whether the pension shall be paid; and, if so, who is the proper person to receive it?

In my opinion, it is very evident, from the terms of the law, that the pension was intended exclusively for the personal benefit of the widow during her widowhood; and if she neglects to apply for it before her remarriage, I think it cannot

What Officers Non-resident of Virginia entitled to Half-Pay.

afterwards be claimed, either by her, or by her husband in the event of his surviving her.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

WHAT OFFICERS NON-RESIDENT OF VIRGINIA ENTITLED TO HALF-PAY.

Field-officers, captains, and subalterns, who commanded in the battalions of Virginia on the continental establishment, or who served in the battalions raised for the immediate defence of the State, or of the United States, and all such officers as became supernumerary on the reduction of any of said battalions, and who again entered the service, when required, in the same or any higher rank, and continued therein until the end of the war, were entitled to half-pay under the laws of that State, although not residents of Virginia.

So, also, were the naval officers of the like rank.

ATTORNEY GENERAL'S OFFICE,

February 9, 1836.

SIR: In your communication of the 8th of December last, you inquire whether, in my opinion, *any* officers in the land service, not citizens of Virginia, were entitled to half-pay under the laws of that State; and you also put to me the like question in regard to the naval service.

I have looked into the statutes of Virginia for the purpose of replying to your question.

The statute of May, 1779, ch. 6, (10 Hening's Stat. at Large, p. 25,) on which the first question arises, provides that "all general officers of the army, *being citizens of this Commonwealth*, and all field-officers, captains, and subalterns commanding, or who shall command, in the battalions of this Commonwealth, on continental establishment, or serving in the battalions raised for the immediate defence of this State, or for the defence of the United States; and all chaplains, physicians, surgeons, and surgeons' mates, *being citizens of this Commonwealth*, and not being in the service of Georgia or any other State, (provided Congress do not make some tantamount provision for them,) who shall serve henceforward, or from the time they are commissioned until the end of the war; and all

What Officers Non-resident of Virginia entitled to Half-Pay.

such officers who have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service, if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half-pay during life, to commence from the determination of their command or service."

If it had been intended to annex the qualification of citizenship to each of the cases enumerated in this section, I think it would have been done by a single general clause. The circumstance that the legislature, instead of adopting that course, have, in two instances, annexed the qualification to clauses providing for particular cases, indicates to my mind an impression on their part that there were good reasons for discriminating between the various classes, and that in some of them the qualification was not to be required. It also appears to me that, in all doubtful cases arising under these acts, the intendment should be, that the law-makers designed to provide for all the officers in the service of their State, whether citizens or not. As a general rule, and especially in recent cases, it is undoubtedly proper to decide all doubtful questions arising on laws appropriating public property in favor of the treasury; because the error, if any there be, in such decision, can be corrected by the legislature. But, in the present case, if too rigorous a rule of interpretation be adopted, the error it may produce must, from the nature of the subject, pass without correction. For these reasons, I am of opinion that the words expressing the qualification of citizenship ought not to be extended beyond the particular clauses to which they are joined. The application of this rule will produce the following results:

1. General officers of the army, and chaplains, physicians, surgeons, and surgeons' mates, to be entitled to the benefits of the law, must be citizens of the State of Virginia.

2. Field officers, captains, and subalterns, who commanded in the battalions of Virginia on the continental establishment, or who served in the battalions raised for the immediate defence of the State, or of the United States; and all such officers who became supernumerary on the reduction of any of said battalions, and who again entered the service, when required, in the same or any higher rank and continued therein

Duties of Attorney General.

until the end of the war, were entitled to the benefits of the law, although they were not citizens of Virginia.

The act of May, 1780, ch. 27, (10 Hening's Stat. at Large, p. 298,) by which the question as to the naval service is to be determined, is in the following words: "*And be it further enacted*, That the said captains, together with the subalterns, and all other commissioned officers of the navy, the master surgeon, and surgeons' mates, shall be entitled to the same pay and rations, the same privileges and emoluments, and rank in the same degree with the officers of the like rank belonging to the regiments heretofore raised for the internal defence of the State."

The principles of interpretation above stated lead me still more satisfactorily, in regard to this branch of the service, to the conclusion that all the officers enumerated in the provision now quoted are entitled to half-pay, without reference to citizenship.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

DUTIES OF ATTORNEY GENERAL.

The Attorney General does not possess the power of revising the decisions of the Executive departments, deliberately made, and entirely satisfactory to the Secretary thereof; and will not give opinions at the instance of parties where no further action is to be had in the premises.

FEBRUARY 12, 1836.

SIR: On the receipt of your letter of the 25th of November last, I gave to the case of George W. Walker, therein stated, a cursory examination; but being much occupied at the time by more pressing calls, and being, moreover, strongly inclined to concur in the views taken by the officers of your department, and confirmed by yourself, and thinking it possible that a more attentive consideration might lead to a different result, I suspended the case for that purpose. Having now resumed the investigation of the subject, and referring more particularly than I had before done to its actual posture, I find myself constrained

Patents to issue for the Creek Reservations.

respectfully to decline giving an official opinion upon it, inasmuch as it appears to have been decided and definitively disposed of by the department on the 12th of November last, after very full consideration, upon grounds then and still believed by it to be indisputable, and to be referred to me solely in compliance with the request of the claimant. I cannot undertake to give an official opinion on the question proposed to me, without assuming that this office possesses a revisory jurisdiction not conferred upon it by law.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PATENTS TO ISSUE FOR THE CREEK RESERVATIONS.

Purchasers of lands reserved by the second and third articles of the Creek treaty of March 24, 1832, must have patents to complete their title.

ATTORNEY GENERAL'S OFFICE,
February 26, 1836.

SIR: In reply to the question proposed to me in your note of yesterday, I have the honor to state that, in my opinion, patents from the United States are necessary to complete the title of the purchaser in all the cases provided for in the second and third articles of the treaty made with the Creek Indians under date of the 24th March, 1832.

By the first article the Creeks cede to the United States all their lands east of the Mississippi river. The Indian title to the whole territory is thus extinguished, and that of the United States rendered absolute.

The second article authorizes certain tracts to be selected from the lands ceded; and the third, after providing that the tracts so selected may be conveyed by the persons selecting the same to any other person, for a fair consideration, in such manner as the President may direct; that the contract shall be certified by some person appointed for that purpose by the President; and that it shall not be valid till approved by the

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President,—declares that a “*title* shall be *given* by the United States on the completion of the payment.”

The third article thus takes distinction between the President’s approbation of the contract and the perfection of the title; it evidently contemplates the necessity of a further act. It is obvious, also, that, as no title had been given to the Indians making the selection, some further act would be requisite to vest in the purchasers the title of the United States.

In the cases provided for in the fourth and sixth articles, it is expressly declared that “*patents*” shall issue to the Indians for the selected tracts. There is no difference between these cases and those before provided for, except that, under the second and third articles, the title is to be given, not to the Indian making the selection, but to the purchaser from him. The *means* of title must be the same in both cases; that is to say, a patent from the United States.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

CHICKASAW RESERVATIONS.

As many surviving Indian wives as were heads of families at the making of the Chickasaw treaty of 1834, (though wives of the same Indian,) are entitled to the reservations made in the fifth article thereof.

ATTORNEY GENERAL’S OFFICE,

February 27, 1836.

SIR: I have the honor herewith to return you the memorial addressed to the President by certain chiefs of the Chickasaw tribe of Indians, which memorial was some time since referred to me for my opinion on the points presented therein.

The fifth article of the treaty with the Chickasaws of July 5, 1834, provides that certain reservations shall be granted, in fee, “*to heads of families, being Indians, or having Indian FAMILIES.*” Under this clause, it has been held, where an Indian had, at the time of the ratification of the treaty, two or more wives, and separate families, that such wives and their respective children are to be numbered together as one family, of which the husband is considered the head, and therefore entitled to the reservation provided by the treaty.

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The memorialists object to this construction on the ground that, according to the customs and laws of the Chickasaws, a plurality of wives is not only tolerated, but that the several wives of one husband usually live separate from each other; that each wife has a separate estate in all the property derived from her relatives or acquired by herself; that the mother is exclusively charged with the support and nurture of the children; that the children do not inherit the property of the father, but that the same goes on his death to his collateral relations; that descents, even in the cases of their kings, are always traced through the maternal line; that the home of each wife is usually regarded as her own, and so known and distinguished by the community; and that their respective children claim no relationship, but are to each other as strangers.

It is admitted, as I understand, that this statement of the memorialists is correct; and, on the strength of it, they submit various questions and suggestions to the decision of the President. One of these suggestions, viz: that each of the wives living with her children separate from her husband, is, within the meaning of the treaty, the "*head of a family*," and that, as such, she, and not the husband, is entitled to the reservation, strikes me as very reasonable and just. In the present case, the United States is not only a party in interest, but, from the necessity of the case, is also the interpreter of the treaty and the final judge of all questions arising thereon. It behooves such a party to act with liberality, and in all doubtful cases to give such a construction as will most effectually promote the end of the provision which is the subject of construction—that evidently was to secure the means of support to the Chickasaws—not, however, as separate individuals, but collectively as families; and to every family, no matter who may be its head, the reservations specified in the treaty are equally needful and important.

I think it will best comport with the principles which ought to be regarded in the construction of this treaty, and with the intent of the parties, to consider each household as a family, and the husband as the head of the family with which he usually resides, and to count all persons usually forming

Who considered Representatives in respect to Virginia Claims.

members of such household, even though there may be two or more wives among them, as part of the husband's family. But in all cases where an Indian woman, though married, has usually, as a housekeeper, lived separately from her husband, and was so living with a separate household under her care at the ratification of the treaty, I am of opinion that she should be regarded as the "head of a family" under the treaty, and, consequently, that she is entitled to the sections reserved in it, according to the number of her children and other persons residing with her.

This construction, whilst it will accomplish the great object of the provision, by securing reservations for every actual family, will only bestow them in those cases which we may fairly suppose were within the understanding of the commissioner on the part of the United States. If he spoke in reference to the language and usages of the Indians, he must, no doubt, have intended to include them; if, on the other hand, he spoke in reference to the language and usages of his own country, the result would be the same. According to them, the husband having a family is the head of that family; but, as polygamy is unlawful, he is the head of only one wife and one family. If he is guilty of concubinage or bigamy, and has illegitimate children, living with their mother, separate from his lawful wife, and forming a family by themselves, he is not regarded by us in law, nor in common parlance, as the head of such family. The woman, according to both, is its head.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

WHO CONSIDERED REPRESENTATIVES IN RESPECT TO THE VIRGINIA CLAIMS.

Executors and administrators are the "legal representatives," in contemplation of the act to provide for liquidating and paying certain claims of the State of Virginia.

ATTORNEY GENERAL'S OFFICE,

March 4, 1836.

SIR: In your communication of the 18th ultimo, after referring to the various provisions of the act of Congress of the

Who considered Representatives in respect to Virginia Claims.

5th of July, 1832, entitled "An act to provide for liquidating and paying certain claims of the State of Virginia," you propose for my opinion the two following questions, arising out of those provisions, viz:

1. Is an executor or administrator the legal representative in the contemplation of this act?

2. If he is, can the Executive, by regulation, require the assent of the heirs to the payment to him of the amount ascertained to be due?

In answer to the first of these questions, I have the honor to state, that, in my opinion, the executors or administrators, (as the case may be,) duly constituted, are the legal representatives contemplated by the act of Congress, of all deceased officers included in the act.

This construction is not only called for by the words used in the act of Congress, but is agreeable to the act of assembly of Virginia, referred to therein, under which the judgments assumed by the United States were obtained; the suits in which those judgments were recovered having been prosecuted, in the case of deceased officers, as I learn from the Virginia reports and other authentic sources of information, in the names of their executors or administrators.

The second question must, in my opinion, be answered in the negative. The act of Congress has not made the assent of the heirs, or next of kin, a condition precedent. In the exercise of a sound discretion, the Executive may, by regulation, prescribe such forms, and create such guards, as are necessary to determine the authenticity of the claims presented under the law, and to prevent frauds on the treasury; but when the "legal representatives" are once satisfactorily ascertained, they are entitled, under the positive provisions of the law, to the moneys directed to be paid to them.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Compensation and Extra Allowances to District Attorneys.

COMPENSATION AND EXTRA ALLOWANCES TO DISTRICT ATTORNEYS.

District attorneys are entitled only to the salary allowed by the act of 1799 and by subsequent laws, and the per diem, mileage, and taxable fees for prosecuting before the federal courts in their respective districts delinquents for crimes and civil actions in which the United States are concerned, or have an interest, cognizable therein, unless some further special provision shall have been made by Congress for individual officers.

Not being required by the laws defining their general duties to attend State courts, nor upon judges out of court, if their services are called for therein, or on other special occasions, and the fees taxed them in such State courts cannot be recovered, or are inadequate, they should be paid a fair compensation out of any moneys appropriated to the special objects in reference to which the services were rendered, or, in some cases, out of the judiciary fund usually provided in the general appropriation bill.

Messrs. Baker and Devereux must, like other officers, find their compensation in the annual stipend and other perquisites annexed to their office.

ATTORNEY GENERAL'S OFFICE,

March 7, 1836.

SIR: In your letter of the 26th of November last, you transmitted to me certain papers connected with claims presented by D. J. Baker, esq., district attorney of Illinois, and by T. P. Devereux, esq., district attorney of North Carolina, for extra compensation for services rendered by them in cases, in their respective States, to which the United States were parties, or in which they were interested; and you requested my opinion on the question whether, under the circumstances stated by those gentlemen, it would be legal and proper to pay their demands.

At the time when these papers were referred to me, I was much occupied with official duties of a more pressing nature; and, before I found leisure to investigate them, I received a communication from the Solicitor of the Treasury, submitting several questions in regard to the compensation of district attorneys and other counsel employed by the United States; and as this reference increased the necessity for a minute examination of the whole subject, I concluded to defer it until the adjournment of the Supreme Court should give me sufficient leisure for that purpose.

Such an examination I have now given to it; and, without

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stating in detail the provisions of the various acts of Congress which have a bearing on the subject, I shall content myself with giving the conclusions to which I have been led.

1. District attorneys of the United States in the States and Territories are bound, by the general duties of their office, to prosecute in the proper manner, and before the regularly constituted courts of the United States, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned. (Judiciary act of 1789, sec. 35, 2 *Bioren and Duane*, p. 71.) The word "*concerned*," used in the act of 1789, was, no doubt, selected for the purpose of embracing cases in which the United States have an *interest*, although the action be not brought in their name as parties on the record. It is, therefore, the duty of the district attorneys to attend to the prosecution of all such actions. For their services in all cases which thus come within the range of their general official duties, they are to be paid by taxed fees, allowed by various acts of Congress, and by the mileage, the *per diem* compensation, and the \$200 salary, allowed by the act of 1799 and by subsequent laws; which salary is expressly given "as a full compensation for all extra services." (3 *Bioren and Duane*, p. 134, sec. 4.) This is the general rule; but exceptions have been made by special legislative provisions—some giving to certain district attorneys additional compensation, and others taking away, in respect to other of their officers, a part of the perquisites above enumerated. But I do not find any such special provision in reference to the district attorneys in Illinois or North Carolina; and, consequently, Messrs. Baker and Devereux, for all the services coming within the scope of their official duties as above defined, are necessarily limited to the perquisites and salary above mentioned.

2. District attorneys are *not* bound, as a part of their general official duties, to attend to the management of suits in the State courts, although the United States may be interested in such suits; nor are they bound to attend to special proceedings out of court, in which the United States are interested. It, however, frequently happens that their services are called for in the State courts, and on other special occasions. For such

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services fees may be taxed to them in the State courts, which may be an adequate compensation; and in all such cases they can claim nothing more. But where such fees may not be recovered, or are inadequate, I think the officer is entitled to receive a fair compensation, to be paid out of any moneys appropriated to the special objects in reference to which his services were rendered; and in some cases, perhaps, out of the judiciary fund, usually provided in the general appropriation bill. It is true that the annual sum of \$200 is expressly given by the act of 1799, as already observed, in full compensation for all extra services. But these words must be understood as having regard to the subject-matter—that is to say, the judicial courts of the United States; and they, therefore, mean extra services in the courts of the United States, for which no special compensation is allowed. The above principles, when applied to the cases of Messrs. Baker and Devereux, as disclosed by the papers referred to me, necessarily lead to the disallowance of their respective claims.

Mr. Baker's claim is for services rendered by him in commencing, preparing for trial, and trying in the district court of the United States for the district of Illinois, a suit instituted under the direction of General Gratiot, chief engineer, &c., in favor of the United States, against Mr. Stewart and others, contractors on the Cumberland road in Illinois, to recover damages for an alleged fraud and failure in the performance of their contract to do certain work on said road. The only circumstance which appears to be relied on to distinguish this suit from the ordinary business of the district attorney, is the fact, that the direction to institute it emanated not from the office of the Solicitor of the Treasury, but from that of the Chief Engineer. This, however, can make no difference. The action was brought for the benefit of the United States and in their name; its prosecution was, therefore, a part of the official duty of the district attorney.

Mr. Devereux's claim is for services in the prosecution of one Patton for forgery, including attendance upon the examination of the prisoner before the district judge. This case was, doubtless, one of great labor and responsibility; but, as all the proceedings against Patton were within the sphere of the official

Right of Choctaw Reservees to Convey their Lands.

duties of the district attorney, Mr. Devereux must find his compensation, like other officers, in the annual stipend and other perquisites annexed to his office.

Both these gentlemen are entitled to draw from the treasury, through the marshal, as provided in the act of 1792, (2 Bioren and Duane, page 301, section 4,) their fees for travelling, and their per diem allowance; and Mr. Devereux is also entitled to receive, in the same way, his taxable fees, according to the State tariff; and perhaps, also, one or two additional items under the act of 1799: and this, in my opinion, is all the special compensation for their services which can legally be made to them.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

RIGHT OF CHOCTAW RESERVEES TO CONVEY THEIR LANDS.

The reservees named in the supplement to the Choctaw treaty of September 27, 1830, may, with the approbation of the President, sell and convey their reserves.

ATTORNEY GENERAL'S OFFICE,
March 18, 1836.

SIR: In reply to the question proposed in your letter of the 19th ultimo, I have the honor to state that, in my opinion, the reservees named in the supplement to the treaty with the Choctaws of the 27th September, 1830, can sell and convey the lands assigned to them, provided it be done with the consent of the President, as provided in the nineteenth article of the main treaty.

It is true the supplement does not expressly authorize the sale of these lands, nor does it contain any expression indicating that they were not to be capable of being sold; but, notwithstanding the silence of the supplement, I think it, on the whole, the better opinion, that these persons may sell and convey under the restrictions imposed by the nineteenth article. They would probably have been included in that article, had not a more liberal provision been made for them in the supplement,

Patents for Choctaw and Chickasaw Reservations.

on the condition of their renouncing all benefit under the main treaty; and it is, therefore, reasonable to suppose that the reservations secured to them in the supplement were intended to be placed on the same footing.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PATENTS FOR CHOCTAW AND CHICKASAW RESERVATIONS.

Patents must issue under the fourteenth and nineteenth articles of the Choctaw treaty of 1830, and the Chickasaw treaty of 1834, in order to divest the United States of title in the reservations.

Patents for reserves, under the former, may issue to Indian residents or assignees; under the latter only to the reservees.

ATTORNEY GENERAL'S OFFICE,

March 19, 1836.

SIR: In your letter of the 2d instant, you inquire whether patents must issue for the reservations provided for in the fourteenth and nineteenth articles, or in the supplement, of the treaty with the Choctaws of 1830; and, if so, whether to the reservee or assignee.

The third section of the treaty cedes to the United States the entire Choctaw country east of the Mississippi; and although the terms employed in the nineteenth article, and in the supplement, are very equivocal, and in some instances look very much like an exception from the cession, or a present grant of the premises intended to be secured to the Indians, yet, when the whole is read and duly considered, I think the language does not amount in any one instance to such an exception or grant.

The Indian title being extinguished, and that of the United States rendered absolute, by the cession, patents must be issued, in order to vest in the parties intended to be provided for the title of the United States.

This was evidently supposed to be necessary by the framers of the treaty, because, in the fourteenth article, it is expressly provided that "grants in fee-simple shall issue."

 Compensation for Extra Services of Lieut. Col. Talcott.

The patents to be issued under the fourteenth article can only be to Indian residents. Those under the nineteenth article, and under the supplement, may be to the Indian reservee, or to his assignee, as the case may require.

You also ask my opinion on the same question, in connexion with the provision of the treaties with the Chickasaws of 1832 and 1834.

The remarks above made are substantially applicable to the Chickasaw treaty of 1834, which, so far as the question now proposed to me is concerned, was substituted for that of 1832; and I am therefore of opinion that patents must also be issued in this case.

The fourth article of the Chickasaw treaty of 1834 requires all deeds executed by Indian reservees to be registered, together with the President's approval thereof, in the State where the land is situated.

This will make it necessary that the patents under this treaty should be issued to the reservee.

I have, &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

 COMPENSATION FOR EXTRA SERVICES OF LIEUT. COL. TALCOTT.

Lieutenant Colonel Talcott is entitled to receive a reasonable compensation for the services performed and the expenses incurred by him for superintending the Springfield armory, whilst he was in command of the Watervliet arsenal; but not as superintendent of said armory whilst there was a regular superintendent in office.

ATTORNEY GENERAL'S OFFICE,

March 21, 1836.

SIR: It appears, by the statement enclosed in your letter of the 3d instant, that in the year 1833, the superintendent of the armory at Springfield being ill, and the affairs of the establishment in some confusion, Lieut. Col. Talcott of the army, then in command of Watervliet arsenal, was ordered to act as superintendent of the armory; and as his own post still required his attention, he was directed to pass between the two posts as

Compensation for Extra Services of Lieut. Col. Talcott.

often as, in his judgment, the public service might require. This order was objected to by Colonel Talcott; but, being reiterated, was complied with by him; and, in consequence thereof, he incurred much extra labor and expense—the two posts being eighty miles apart, and all his military duties being duly performed by him, independently of the labor and responsibility attached to the civil trust temporarily committed to his care. In November, 1833, he charged, and received from the armory paymaster, \$731 09 for his services at the armory, being the pay and emoluments of the superintendent for the time he was employed. His pay, &c., as an officer of the army, for the same period, was also charged and received by him in the usual way. The former superintendent was also paid to the day of his death, and the new one from the date of his appointment, a few days before he entered on his duties; and these payments cover a portion of the time for which Lieut. Col. Talcott performed the duties of the office. On this case, you submit for my opinion the question, whether Lieut. Colonel Talcott can be paid in two situations—*first*, as an officer of the army; and, *secondly*, for the civil duties performed by him as above stated?

Under the circumstances of this case, it is very evident that Lieut. Col. Talcott is justly entitled to a reasonable compensation for the services performed and the expenses incurred by him as acting superintendent of the Springfield armory.

Those duties were not within his official obligations as an officer of the army, and the pay and emoluments which he received in that capacity were, therefore, no remuneration therefor; nor does the fact that he received such pay and emoluments at all impair the justice of his claim to a reasonable indemnification for his extra expenses and labor. That the persons holding the legal commissions of superintendents of the armory were entitled to receive, and did receive, the pay and emoluments annexed by law to the office, during a portion of the time for which Lieut. Col. Talcott was in charge of the establishment, is no good objection to the payment of such an indemnification; though it may be a good objection (in part, at least) to the payment thereof in the particular form which has been adopted. Strictly speaking, this was a necessary

Sureties of Debtors not Liable to Detention of their Pay.

contingent expense; and its amount ought to be settled like other contingent expenses, and paid out of the funds, if any, at the disposal of the Secretary of War for that purpose. The regular pay of the superintendent may be a very good rule for settling the amount of the compensation; but Lieut. Col. Talcott should not be paid as *superintendent*—at least not for the time the office was filled. For his expenses and services he should receive, out of any moneys appropriated for contingent expenses of the armory, such sum as the head of the department may deem reasonable and just. But if there be no appropriation for contingent expenses of the armory, the claim must be referred to Congress, except for the short time during which the office was vacant; for which time there can, in my opinion, be no objection to paying him as acting superintendent, provided the Secretary of War shall think it no more than a reasonable compensation.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

SURETIES OF DEBTORS NOT LIABLE TO DETENTION OF THEIR PAY.

Sureties of a delinquent or defaulting principal obligor in a custom-house bond are not liable to detention of moneys due them—the phrase “who is in arrears to the United States,” contained in the act of 25th January, 1828, applying only to persons who, having previous transactions of a pecuniary nature with the government, are found upon the settlement of those transactions to be in arrears.

ATTORNEY GENERAL'S OFFICE,

March 21, 1836.

SIR: It appears from the report of the Solicitor of the Treasury, enclosed for my consideration in your letter of the 16th instant, that Elbert Herring, esq., Commissioner of Indian Affairs, is named, in the list of unpaid custom-house bonds, as a debtor to the United States, as surety in such bonds; and that the Solicitor of the Treasury entertains doubts whether a debtor as a surety in custom-house bonds is embraced in the act of the 25th of January, 1828, entitled “An act to prevent defalcations on the part of disbursing agents of the govern-

Sureties of Debtors not Liable to Detention of their Pay.

ment, and for other purposes." My opinion on the point is, therefore, requested by you.

In reply, I have the honor to state that the question has been substantially decided, so far as this office is competent to decide it, by the opinion of my predecessor, given under date of the 22d of July, 1824, on the provisions in the second section of the general appropriation act of 1823. These provisions (except merely formal variations, and except, also, that the second contained an express exemption of the Vice President of the United States) are in the very words of the act of 1828, which was substituted, as a general and permanent law, in lieu of the provisoes, for several years before that time annually inserted in the appropriation bills. The act of 1828 is in the following words: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no money hereafter appropriated shall be paid to any person, for his compensation, who is in arrears to the United States, until such person shall have accounted for, and paid into the Treasury, all sums for which he may be liable: *Provided*, That nothing herein contained shall be construed to extend to balances arising solely from the depreciation of treasury notes received by such person, to be expended in the public service; but in all cases where the pay or salary of any person is withheld in pursuance of this act, it shall be the duty of the accounting officers, if demanded by the party, his agent, or attorney, to report forthwith to the agent of the Treasury Department the balance due; and it shall be the duty of the said agent, within sixty days thereafter, to order suit to be commenced against such delinquent and his sureties."

In the opinion to which I have referred, Mr. Wirt thus expresses himself: "The phrase, 'who is in arrears to the United States,' seems to apply, materially and properly, only to persons who, having previous transactions of a pecuniary nature with the government, are found, upon the settlement of those transactions, to be in arrears to the government, by holding in their hands public moneys which they are to refund.

"This construction, arising from the force of the language used in this proviso, receives additional confirmation from the example stated by way of exception in the second proviso,

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which is—‘That nothing in this section shall extend to balances arising solely from the depreciation of treasury notes, received by such person to be expended in the public service, or to the appropriation for compensation to the Vice President of the United States,’ &c.

“These examples serve as illustrations of the meaning of the first proviso; the whole policy of which seems to be, to draw from public defaulters the public moneys which remain in their hands; and for which, upon the settlement of their accounts, they may be found liable.”

If the preceding views were well taken in reference to the enactment, when contained in the general appropriation bill, (and I think they were,) they apply to it with increased force as contained in the act of 1828; because it then became necessary to prefix a title, indicating the nature and general purpose of the law. The title is not, indeed, decisive as to the construction of a statute; but it is always entitled, and especially when the statute is a short one, to much consideration. In the present case, it fully conforms to the exposition above given by the Attorney General. That part of the title which describes the law as an act “to prevent defalcations on the part of disbursing agents,” evidently indicates the great purpose of the law, and gives the key to the general interpretation. It is true that it is also described as an act “for other purposes,” but this part of the description is sufficiently answered by the closing provision, authorizing the party to demand a suit, and directing the agent of the treasury to institute one. This latter provision justifies a remark, not made by my predecessor, but strongly calculated to fortify his construction, and to show that neither sureties nor principals in custom-house bonds were intended to be included. If the party demand it, “it shall be the duty of the accounting officers to report, forthwith, to the agent of the Treasury Department, the balance due,” and the agent within sixty days is to order suit, &c. This shows that the cases contemplated by the legislature were those of persons with whom the government had accounts composed of pecuniary items on both sides, and whose debts, consisting of the balances of such accounts, were usually reported by the accounting officers to the agent of the treas-

Patents for Ottawa, Chippewa, and Pottawatomie Reservations.

ury for suit. This is all wholly inapplicable to custom-house bonds, which do not become the subject of account in the accounting offices, and are not reported by the collectors until they become payable, and, if not then paid, are to be immediately put in suit by the collector.

I am, therefore, clearly of opinion, agreeably to the construction of my predecessor, that the act in question does not extend either to sureties or principals in custom house bonds. But if I could find any reason for doubting whether it extended to a principal debtor in any such bond, the concluding words of the law (which have not yet been commented on) would require me to restrain the operation to the case of principals merely. The suit, when ordered, is to be commenced "against such delinquent and his *sureties*." The *delinquent* here spoken of, is the "*party*" and the "*person*" against whom the prior provisions of the law are levelled; and this last clause shows that, in the contemplation of the law-makers, the *delinquent*, whoever he might be, whether a disbursing officer or not, was, at all events, to be a *principal* debtor, and not a mere surety.

I am, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PATENTS FOR OTTOWA, CHIPPEWA, AND POTTAWATOMIE
RESERVATIONS.

Patents are requisite to divest the United States of title to the Ottawa, Chippewa, and Pottawatomie reserves, and should be so issued as to disclose the estate granted.—(See opinions of the 19th instant and 26th ultimo, on the subject of Indian reservations.)

ATTORNEY GENERAL'S OFFICE,

March 26, 1836.

STR: In reply to the question proposed in your letter of the 22d instant, I have the honor to state that, in my opinion, patents must be issued to the individuals to whom lands are agreed to be granted in the fourth article of the treaty with the Chippewas, Ottowas, and Pottawatomies, of the 29th July, 1829. The case comes within the principle of my opinions of the 26th ultimo and the 19th instant.

Location of the Choctaw Reservations.

I would suggest that in all these cases, where the patent is to the Indian, and there is a restriction in the treaty on his power of sale, the patent should either state such restriction in express terms, or make such reference to the treaty as may preclude any question as to the nature of the estate.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

LOCATION OF THE CHOCTAW RESERVATIONS.

The reservations under the Choctaw treaty of 1830 may be located on the sections granted in the act of March 2, 1819, to Alabama for the use of schools, notwithstanding said act, for the reason that the United States could only grant subject to the Indian right of occupancy. The contingency was provided for in the authority given for the granting of equivalent contiguous lands where section sixteen was disposed of.

There was no such proviso, however, in the offer of lands to Mississippi.

ATTORNEY GENERAL'S OFFICE,

March 31, 1836.

SIR: In your letter of the 15th instant you ask my opinion on the question "Whether, under the provisions of the acts of Congress providing for the admission of Alabama and Mississippi into the Union, respecting the grant of the 16th section in each township for the use of schools, reservations for claimants under either of the articles of the Choctaw treaty of 1830 can be located on that section?"

The sixth section of the act to enable the people of the Alabama Territory to form a State constitution, &c., approved March 2, 1819, offered, among other things, to the convention about to be held, the following proposition, viz: "that the section numbered sixteen in every township, and where such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same, *shall be granted* to the inhabitants of such township for the use of schools."

This proposition, having been accepted by the convention, became, and is, obligatory on the United States; that is to say, the faith of the nation is pledged to execute it literally, provided the government of the United States possess or acquire the

Location of the Choctaw Reservations.

ability to do so. But the words do not amount to a present grant; on the contrary, the engagement is executory, and no particular time is specified for its fulfilment. Reason and good faith, however, require that it be executed from time to time, as fast as the United States shall be able to designate the sections, and to convey a good title therein; but if, for any cause, the United States should be incapable of a literal execution, or should refuse to execute, the inhabitants of Alabama would have no other means of obtaining compensation or redress than such as might be found in an appeal to Congress.

In regard to that part of the Territory of Alabama which, in 1819, was occupied by the Choctaws, it is also to be observed that the United States were incapable of making any grant thereof, except subject to the Indian right of occupancy. As to the Choctaw country, the proposition above quoted must, therefore, be regarded as subject to the implied condition, that the United States should be able so to extinguish the Indian title as to enable them to execute the engagement according to its terms.

The provisions of the Choctaw treaty which secure to persons of that tribe certain reservations of land, were indispensable parts of the means to which the United States were obliged to resort to extinguish the Indian title; and as no exception of the sixteenth section was contained in that treaty, nor any allusion made to the compact with Alabama, it would be unjust towards the Indians, and an infraction of the treaty, to prevent them from locating on those lands. As between the Indians and the United States, the treaty itself is the only measure of their respective rights; and no restriction not found in that instrument can be imposed on the right of locating the reservations secured by it.

Even, therefore, had the engagement of the United States been positive to grant to the State of Alabama the sixteenth section, I should hold, in the case which had actually occurred, that the claimants under the treaty could not be affected by it.

But the agreement is not exclusively confined to that section. It contemplates the contingency of that section being otherwise disposed of, and makes provision for such an event. So far as that part of the Territory which was occupied in 1819

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by the Choctaw Indians is concerned, I think the words “and when such section *has been sold, granted, or disposed of*,” must be considered as applicable to the state of things which should exist when the Indian title should come to be extinguished; and the sixteenth section, if claimed by an Indian reservee under the Choctaw treaty, will have been “*disposed of*” within the meaning of the original proposition; and in that case it is expressly provided that *other* equivalent and contiguous lands are to be granted.

I do not find any special provision relative to the sixteenth section in the acts concerning the State of Mississippi.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

HON. LEVI WOODBURY.

PENSIONS—CONSTRUCTION OF ACT OF MAY 15, 1820.

The accuracy of the construction given by Mr. Wirt to the act of the 15th May, 1820, to revive and continue in force an act to provide for persons who were disabled by known wounds received in the revolutionary war, and for other purposes, is doubted.

Under the peculiar circumstances in which the applicant was placed, the law was not applicable to his case.

The regulation restricting the commencement of pensions to the time when the papers shall be authenticated, is repugnant to the act of 1820.

‘ATTORNEY GENERAL’S OFFICE,
March 31, 1836.

SIR: I have had the honor to receive your communication of the 2d instant, submitting for my opinion certain questions presented in a report from the Commissioner of Pensions, in relation to a pension claimed by General Ripley.

It appears, from the document referred to me, that in September, 1829, General Ripley applied to your department for a pension on account of disability arising from a severe wound which he received, while in the service, on the 17th of September, 1814; and that he claimed pay from the time the wound was received. His claim for back pay was not admitted by the Secretary of War, on the ground that the second section of the

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act of the 15th of May, 1820, applied to the case, and limited the commencement of the pension to the time when the testimony was completed. In 1831, General Ripley again made application to the department; but a pension was not granted, because the surgeon's affidavit was defective, in not being sufficiently clear in stating the disability, and in not having the necessary authentication. A letter containing the objections was addressed to the claimant on the 9th of March, 1831. In December last, application was again made, and the claim allowed, (there being then no objection to the evidence,) to commence on the 21st of November, 1835. The pension certificate was, however, returned by General Ripley, who again urged his claim for pay from the 17th of September, 1814, on several grounds, stated at length in an argument, which is among the papers referred to me, and in which he asks a decision—first, on the question, whether he is entitled, under the 14th section of the act entitled "An act to raise an additional military force," passed January 11, 1812, to a pension from the 17th of September, 1814, the day on which he was wounded; and should the decision be adverse to his claim, he asks, second, for pay from the 30th of July, 1830, the date of the surgeon's affidavit, which was filed in 1831.

In relation to these points, the Commissioner supposes four several questions to be involved, to which he wishes the attention of the Attorney General to be directed, and which I shall, therefore, proceed to answer in their order.

1. "Whether the second section of the act of the 15th of May, 1820, entitled 'An act to revive and continue in force an act to provide for persons who were disabled by known wounds received in the revolutionary war, and for other purposes,' has been properly interpreted by this department in extending it to other than revolutionary cases?"

It appears from the records of this office, that the construction adopted and acted on by your department was officially given by the Attorney General, in his opinion on the case of Colonel Johnson, dated the 2d of July, 1822; and that it has been recognised and followed ever since that date, not only in your department, but by my predecessors in office.

As a general rule, I adopt the decisions of the office on points

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officially presented, without attempting to review the grounds on which those decisions proceeded; this being the course usually pursued by courts of justice, and being, indeed, indispensable to despatch of business, and still more so to uniformity of judgment. For the same reason, even where my attention is particularly called to a prior decision, and especially if it be one which was made by one of my predecessors, and which has been acquiesced in and followed for any length of time, I should yet feel myself bound, in ordinary cases, to adhere to it.

In the present instance, I have felt it my duty, in compliance with the distinct inquiry of the Commissioner of Pensions, to look with some care into the decision referred to. As the result of this examination, I am constrained to say that I have strong doubts as to the accuracy of the construction heretofore given to the act of 1820—so strong, indeed, that if the question were an open one, I should think it the safer and more equitable course to confine the law exclusively to revolutionary cases.

Although I do not suppose that you will think it expedient, on the doubts now expressed, to reverse the practice which has hitherto obtained in your department; I yet think it due to General Ripley, whose claims may perhaps be urged in another place, to state some of the prominent reasons which induce me to distrust the accuracy and justice of the rule in question.

The second section of the act of May 15, 1820, is in the following words:

“And be it further enacted, That the right any person now has, or hereafter may acquire, to receive a pension in virtue of any law of the United States, shall be construed to commence at the time of completing his testimony pursuant to the act hereby revived and continued in force.”

The first clause certainly favors the construction which has been given. “In virtue of any law of the United States,” is a phrase of very extensive import; and if the section had ended with the word “*testimony*,” there would have been nothing to restrain the generality of that phrase, and no doubt could have existed as to its construction.

But the section does not end with *that* word; it uses certain additional words, which form a very material part of the law, and to which it is our duty to give full effect in construing the

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provision. We have no right to reject them, nor to give them such a construction as to render them absurd or inoperative.

They carry us directly to the act of 1806, named in the title, and revived by the 1st section.

The testimony is to be completed "*pursuant*" to the act of 1806, named in the title, and revived in the body of the law. By referring to that act, it will be seen that it relates exclusively to persons who received known wounds in the revolutionary war; and that the 2d section prescribes very minutely the rules and regulations to be observed in substantiating claims intended to be preferred under it. These rules and regulations are, in their character, twofold; they determine the *fact* to be proved, as well as the *mode* or *means* of proof. The former is "decisive inability, the effect of a known wound or wounds received while in actual service during the revolutionary war;" the mode of proof is to be by affidavits of the commanding officers and surgeons, or others, and the examination, on oath, of the claimant.

Strictly speaking, the testimony cannot be completed *pursuant* to the act of 1806, unless it conform to that act in respect to the *fact* required to be proved, as well as in respect to the *mode* of proof. In revolutionary cases, this would certainly be deemed the effect of the word "*pursuant*." In this sense, it would be impossible for a person disabled during the war of 1812, to complete his testimony pursuant to the act referred to; and if this be the proper construction of the word "*pursuant*," then it will necessarily restrain the generality of the phrase "*any law*," used in the former clause, and compel us to limit the whole section to cases which arose in the revolutionary war. In the brief opinion of my predecessor, these latter words are not made the subject of comment, nor do they appear to have attracted his attention. This is evident from the opinion itself, which is in the following words: "On the subject of Colonel Johnson's pension, I cannot see how it can be withdrawn from the sweeping provision of the second section of the act of 15th May, 1820; which directs that all pensions in virtue of any law of the United States shall be considered to commence at the time of completing the testimony. This provision is so direct and so universal, that the ground on which

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your doubts are founded is not discovered; and I should be glad to confer with you on the subject, before you act on this opinion."

Upon the construction which was thus given to the law, the word "*pursuant*," when applied to cases arising in the war of 1812, must be deemed to apply only to the *mode* of proof, and not to the *fact* to be proved; thus giving to one and the same word, in the same law, two different interpretations. This is sometimes done by the courts, when the necessity or justice of the case calls for such an accommodation of the language used by the lawgiver.

In the present instance, it seems to me that there is no adequate necessity for this unusual straining of the language; because, by construing the words "*any law*" to mean any law relative to revolutionary cases, the whole section is rendered consistent with itself.

This construction is also not only strained, but, in my judgment, it makes the law palpably unjust.

The act of January 11, 1812, declares that if any officer, &c., shall be disabled by wounds or otherwise, while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pension, and under such regulations, as are, or may be, directed by law," &c. This act does not provide at what time the pension shall commence, except so far as such provision is included in the words "at such rate of pension," and "under such regulations as are, or may be, directed by law;" which words refer us (according to the opinion of the Attorney General in the case of General McNiel, dated May 31, 1832) to the act of the 16th of March, 1802—that being the only general law then in force applicable to the subject. The 14th section of the act of 1812 directs that the party disabled shall be placed on the list of invalids "at such rate of pay and under such regulations as may be directed by the President of the United States for the time being." The President, therefore, had the power to prescribe, by regulation, the time when pensions for disabilities under the act of 1812 should commence.

I cannot learn that any formal regulation on this point was ever made by the President until the 18th of April, 1829, when

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the President directed an order to be published, declaring that in future no person, while in the receipt of pay or emoluments as an officer of the army, should be placed on the pension list. The practice of the Pension Office had, however, from an early day, been governed by the same rule; which was expressly prescribed by the old Congress in the resolution of the 26th August, 1776, and in other resolutions of later date. This usage being kept up by the War Department, with the sanction of the President, before and at the enactment of the act of 1812, was, within the meaning of the law, a regulation directed by the President, and was, in effect, incorporated in it. All persons entering the army under that act were therefore bound to know that, if disabled, they could not receive pensions as invalids so long as they retained their places in the army, and received the pay and emoluments thereof. But I am distinctly informed by the Commissioner of Pensions, that this was the only limitation imposed by the usage of the office, prior to the act of 15th May, 1820, on the payment of pensions for disabilities under the act of 1812; and that where the party left the army at the time he was disabled, the pension was considered as accruing from the date of the disability, no matter when the testimony was completed or produced. This being the case, all persons who entered the army under that law had good reason to expect that, if they should become disabled, they would be allowed pensions according to the nature of their disabilities, to commence from the time when they should cease to receive the pay and emoluments of the service. The contract between them and the government was not precisely to that effect, because it was subject to the contingency that the President might prescribe other regulations which might limit still further the commencement of the pension. But, as this power has not been exercised, the case may be considered as standing precisely on the same ground as though it had not existed.

Under these circumstances, it appears to me, that from the time when General Ripley was disabled by a wound received in the line of his duty, he had a just claim on the good faith of the nation to be placed on the pension-list from the time when his pay and emoluments as an officer should cease. And ac-

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cording to the usage of the office, and to the only regulation which has been made by the President, touching the time from which the pension is to commence, if he had made his application at any time before the enactment of the act of the 15th May, 1820, he would have been allowed his pension from the time when his pay ceased, which I understand was in 1821. His right to such a pension was not, indeed, an absolute one; but it was founded on the pledge contained in the act of 1812, and fortified by considerations of the most interesting and impressive character.

The effect of the construction given by my predecessor to the law of 1820 was to take away this right; and though it may be admitted that Congress had the power to do this, yet I think there can be little difference of opinion as to the harshness and injustice of such an exercise of legislative authority.

In regard to such revolutionary cases as might be presented under the act of 1820, there was no injustice in applying the rule given in the 2d section of that law, because all claims of that sort had been barred by lapse of time, even before the passage of the act of 1806—which act, as well as the act reviving it, had expired; and because that act also contained an express provision that every pension under it should “commence on the day when the claimant shall have completed his testimony.” This being the rule by which the pensions gratuitously proffered by the act of 1806 were to be governed, there could be no objection to repeating the same rule in reference to such cases (though it was probably unnecessary to have done so) in the act of 1820. But such a rule, when applied to cases arising under the act of 1812, which contained nothing to warn parties of the necessity to make immediate applications, and under which a different usage had obtained up to the 15th of May, 1820, was, in my opinion, positively unjust; because it defeated the expectations which persons entering the service under the law of 1812 had a right to cherish; made no discrimination between cases of supine neglect and those of forced delay; allowed nothing for difficulties occasioned by sickness, loss of papers, or other unavoidable accident; and, above all, operated retroactively on the rights of parties.

It is a first principle in the interpretation of statutes, that,

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where the words are doubtful, such a construction is to be preferred as will be most consistent with the reason and justice of the case. This principle, I think, would have justified my predecessor in construing the second section of the act of the 15th of May, 1820, as not extending to cases arising under the act of 1812; and, were I not restrained by the respect due to superior ability and learning, I would say that such a construction was demanded by that principle.

The action of Congress subsequently to the law of 1820 is also calculated to strengthen the doubts above expressed. That act revived the act of 1806 for one year only; but, by the act of the 4th of February, 1822, the act of 1806 was again revived for six years, and until the then next session of Congress; and by the act of the 24th of May, 1828, it was once more revived and rendered permanent. Each of these last named reviving acts repeats, *in hæc verba*, the second section of the act of the 15th of May, 1820. The repeated re-enactment of this provision is altogether inconsistent with the idea of its being a general or permanent provision; and shows that, in the judgment of the legislature, it had expired with the expiration of the acts in which it was contained.

Upon the whole, I entertain, for the reasons above assigned, such strong doubts as to the accuracy of the interpretation heretofore given to the law in question, and so decided an opinion as to the injustice of the law itself, if the construction given to it is the correct one, that I cannot but hope that Congress may even now interfere in these cases, and carry back the pensions to the time when the disabled party ceased to receive the pay and emoluments of the service.

2. "Whether, under the peculiar circumstances in which the applicant was placed, the law was applicable to his case?"

The circumstances here referred to are the following :

In May, 1820, a large balance stood to the debit of General Ripley, in the accounting offices, for arrears of money received by him for disbursement during the war of 1812. Suits were subsequently brought against him to recover such balance; he resisted the recovery on the ground that he was not indebted to the United States, but, on the contrary, that the United States were justly indebted to him; and, after various proceed-

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ings in the controversy, it was finally disposed of by a verdict in favor of the defendant, which closed the account at the treasury; and, according to the certificate of the jury, still left General Ripley a creditor of the United States to a large amount. Under these circumstances, he contends that, if the law of 1820 applies to other than revolutionary cases, it ought not to affect him; because, as he alleges, he was at the time, and ever after, until the closing of his account by the verdict in his favor, disqualified by law from drawing his pension; and, being so disqualified, the limitation contained in that act did not, and could not, run against him, until it ceased to exist.

The disqualification on which this argument is founded did not, so far as I can discern, exist until the 3d of March, 1823, when a provision was first introduced into the act "making appropriations for the military service of the United States for the year 1823," (which act included an appropriation for invalid pensioners,) prohibiting the payment of any money thereby appropriated to any person for his *compensation*, "who is in arrears to the United States, until such person shall have accounted for, and paid into the treasury, all sums for which he may be liable," &c. This prohibition was for several years incorporated in the general and other appropriation bills; and, in 1828, was enacted as a permanent law, by the act "to prevent defalcations on the part of disbursing agents of the government, and for other purposes," approved January 25, 1828. This inhibition, in my opinion, extends to the case of an invalid pensioner; and it must, therefore, be conceded that, from March, 1823, until the balance standing against General Ripley on the books of the treasury was extinguished, he was disqualified to draw his pension, even had it been previously allowed to him. It is also true, as a general rule, that statutes of limitation do not run against persons disqualified by infancy, interdiction, or any other cause, to enforce their claims; all such cases being usually excepted from the statutory bar. But it does not appear to me either that the act of 1820 can with propriety be regarded as a limitation law; or, if such be its true character, that the case of General Ripley can be brought within the principle of the exceptions above stated. The statute does not attempt to prescribe the time within which the claim is to

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be preferred; nor did the disqualification under which General Ripley labored prevent him from making or establishing his claim. He might have preferred and established it; and, although no money could have been paid thereon until the balance standing against him was extinguished, yet, on the closing of his accounts, he would have been entitled to receive all that had accrued during the interval, and to be regularly paid thereafter. If, then, the second section of the act of 1820 applies to this case, I must be considered as answering the present question in the negative.

3. "Whether the rule which declares that the evidence is complete only when the papers are duly *authenticated*, and all objections to the claim cease, is conformable to the spirit of the law?"

The accuracy of the rule being thus called in question, I think it my duty to state my views on the subject, although the rule itself is in entire conformity to the second opinion of the Attorney General in the case of Colonel Johnson, dated the 19th of July, 1822, which opinion was the result of a very mature consideration; and although it has also been adopted in the President's regulation of the 18th of April, 1829.

The first section of the act of the 15th of May, 1820, refers us to the act of the 10th of April, 1806; and whatever would *complete* the testimony under that act must certainly be sufficient. Now, the second section of the act of 1806 expressly prescribes the rules and regulations which are to be complied with in substantiating claims. They consist of certain proofs to be made by affidavits before the judge of the district, or one of the judges of the Territory in which the claimant resides, or before some person specially authorized by commission from said judge; and after the proofs have been duly submitted to the proper judge or commissioner, he is to "certify, in writing, his opinion of the credibility of the witnesses whose affidavits he shall take, in all those cases where it is said the proof shall be made by a credible witness or witnesses; and, also, that the examining physician or surgeon is reputable in his profession." The third section provides that the judge or commissioner shall transmit a list of such claims, accompanied by the evidence, affidavits, certificates, and proceedings had

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thereon, "noting particularly the day on which the testimony was closed before him," to the Secretary of War, &c. And the fourth section of the same act of 1806 declares "that every pension, or increase thereof by virtue of this act, shall commence on the day when the claimant shall have completed his testimony before the authority proper to take the same." Under the act of 1806, it is therefore manifest that the date of the last affidavit, or last oral examination on oath, before the judge or commissioner, was the true date from which the pension was to commence; and as this rule is referred to and adopted by the act of 1820, I do not see how any other formality, not required by the act "thereby revived and continued in force," can be made the test of the completing of the testimony "*pursuant*" to the act. If further evidence be necessary to *authenticate* the proceedings, the President, or the Secretary of War acting under his authority, may undoubtedly require it; and so far the President's regulation of the 18th of April, 1829, may be regarded as perfectly consistent with the act of 1820. But I am clearly of opinion that the rule referred to in the question I am considering, and the opinion on which it was originally founded, and the regulation by which it is now continued, so far as they postpone the commencement of the pension to any day later than that on which the testimony was closed before the officer taking it, is repugnant not only to the spirit, but to the express words of the act of 1820.

The remaining question proposed by the Commissioner is fully met and disposed of by the conclusion just expressed.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PENSIONS TO WIDOWS.

This opinion withdraws that delivered on the 9th of February last, and lays down the law as the same was expressed by Mr. Wirt in his opinion of the 9th of June, 1825, treating a pension to a widow as a vested right, ceasing upon her marriage as to further claim upon the government, but remaining valid for arrears.

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The rights of the surviving husband in and to those arrears, depend upon the laws of the State where the parties resided at the time of the wife's demise.

ATTORNEY GENERAL'S OFFICE,

April 5, 1836.

SIR: The claimant referred to in your letter of the 25th of January last, (on whose case I expressed an opinion adversely to his claim, by my letter of the 9th of February,) having suggested to me that he had reason to believe that a different decision had been made by one of my predecessors, I withdrew my letter from your department, a few days since, for the purpose of re-examining the subject.

Supposing, when I received your communication, that the question proposed to me was one which had never been considered in this office, nor affected by any usage in your department, I gave to it such a reply as the language of the navy pension laws seemed to me to require. I cannot say that my own impressions, as to the intent of Congress in the enactment of those laws, is changed by any subsequent reflection bestowed upon them; but, on a diligent examination of the records of the office, I have found an opinion which takes an entirely different view of the subject, and which appears also to be supported by the usage of your department—on which, indeed, it was very much founded. And as I am not only very willing to yield my own impressions, on a question of this nature, to such authority, but, indeed, think it due to consistency of administration and the rights of parties that I should do so, I beg leave to recall the decision heretofore given, and to apply to the case the principles thus established or confirmed by my predecessor.

The case stated in your letter of the 26th January is as follows: "During the late war with England, an individual was killed on board of a private armed vessel of the United States, in an action with a British ship. His widow did not apply for a pension. She married again; but the second husband, during her life, did not prefer the claim. After her death, he demanded the pension from the date of the first husband's death to the time of the second marriage. The woman had no children."

On this case you inquire, 1st, Whether a pension shall be paid? and, if so, 2d, Who is the proper person to receive it?

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The opinion of the Attorney General dated the 9th of June, 1825, and transmitted on that day to the Secretary of the Navy, settles the first of these questions in the *affirmative*.

In that case, as in the present, a person had lost his life during the late war, while in the line of his duty on board a private armed vessel. He left a widow and children under the age of sixteen. No application for a pension was preferred until 1825, before which time the widow had intermarried. After her remarriage, she applied for a pension on behalf of her children, (some of whom were under sixteen) and, also, for the portion of the pension between the death of her first husband and her second marriage. The Attorney General, in an elaborate opinion, in which he stated the provisions of the laws, and the practical construction which he understood they had received in the Navy Department, decided that the widow had a vested and perfect right to the pension during her widowhood, and that her right to receive it for that period was not affected by her subsequent marriage.

The precise point now presented was not, indeed, submitted for decision in that case; but the principle laid down by the Attorney General, and the reasoning of his opinion, are equally applicable to the present claim, as you will perceive on referring to the opinion, which, I take for granted, may be found on the files of your department. Indeed, he puts, by way of illustration, the very case involved in your question, and speaks of it as having been settled by the practice of the department. "I understand," says the opinion, "that even where the widow has intermarried before she has made any application, or has died before she has made any application, the uniform practice of the department has been, not to consider the application too late for all that was due at the time of her intermarriage or *death*, the department having heretofore considered *that* as having been done which ought to have been done." And he proceeds to express his approbation of the practice as conformable to the spirit and design of the law. For a fuller exposition of the grounds on which the opinion of my predecessor was founded, I beg leave to refer you to the document itself.

Your second question must be solved by applying to the present case the rules of law in regard to the right of the hus-

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band in the property of his wife, in force in the State where the parties resided at the time of his wife's death. By the law of England, the husband, if he survives his wife, is entitled to administer on her estate, and to recover all debts due to her at the time of marriage, and all her other outstanding choses in action, for his own use, subject only to his liability for debts contracted by her whilst a *femme sole*, to the extent of the assets received by him. This is the general rule in the American States; though in Maryland, and perhaps in some other States, the husband has been relieved from the necessity of taking out letters of administration.

I am, sir, &c., &c.,

B. F. BUTLER

To the SECRETARY OF THE NAVY.

PENSIONS TO WIDOWS.

The widow of a master-at-arms in the navy of the United States who died in consequence of a fall through the hatchway of the United States ship *Ontario*, (who was an officer within the act of 1813,) is entitled to a pension.—(See opinion of Attorney General of March 31, 1825.)

If the husband is to be regarded only as a seaman, and the widow not within the act of 1813, she is referred to the act of 3d March, 1817, as all rights under that law are saved, although the act has been since repealed.

The right of a widow under the act of Congress to so much money per annum on the happening of a certain event is vested, and not defeated by her subsequent marriage only from the time of the marriage.—(See opinion of 9th June, 1825.)

The result is that the applicant is entitled to a pension of ten years prior to the act of the 30th of June, 1834, and under it to a pension of five years, to commence on the day of the passage thereof.

ATTORNEY GENERAL'S OFFICE,

April 5, 1836.

SIR: In your letter of the 10th of February last, you state that on the 18th of May, 1815, Benjamin White, master at-arms in the navy of the United States, died in consequence of a fall through the hatchway of the United States ship *Ontario*, leaving a widow, who now for the first time claims a pension. I infer from your letter, (though the facts are not distinctly stated,) that Mr. White was killed in the line of his

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duty, and also that Mrs. White has not been married since her husband's death. After referring me to various acts of Congress applicable to the subject, you request me to inform you "whether, in my opinion, the benefits of these laws ought to be now extended to Mrs. White; and if not, whether she is entitled to any pension; and if entitled, at what time the pension should commence, and for what period should it be allowed?"

The acts of Congress in relation to navy pensions are so numerous and intricate, that I have found it a task of no little labor and difficulty to extract from them a satisfactory reply to your queries; especially as I find, on a careful examination of the records of this office, that many of their provisions have, from time to time, been referred to this office for construction, and that, on several of those occasions, the decision appears to have been founded rather on the usage of your department than on the language of the legislature.

To secure uniformity of judgment, and conform, as far as I can, to the practice which has heretofore obtained in analogous cases, I shall take up the case of Mrs. White at the date of her husband's death, and, by the aid of the decisions made by my predecessors, endeavor to dispose of it in accordance with the principle of those decisions.

On the 18th of May, 1815, the only laws applicable to the subject were the acts of the 13th of February, 1813, and the 4th of March, 1814.

According to the construction given to the act of 1813 by the Attorney General, in his opinion of the 31st of March, 1825, it embraces every case of an officer killed in the line of his duty, whether killed in battle or by casualties; and the case of Benjamin White was therefore within it, provided he is to be considered as an *officer*—for the act does not extend to seamen. I am by no means certain that a master-at-arms is an officer of the navy, within the meaning of the act of the 20th January, 1813. In the acts of Congress then in force, he was called and treated as a *petty officer*, as contradistinguished from *seaman*. I am, therefore, inclined to think he was an *officer* within the act of 1813, and that his widow was, accordingly, entitled to the benefits of that law; but, as this is a ques-

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tion which belongs rather to the naval service than to this office, I shall not express a positive opinion thereon.

If the act of February, 1813, did not embrace this case, then Mrs. White, at the time of her husband's death, was not entitled to any pension; because the act of the 4th of March, 1814, as expounded in the above-cited opinion, was confined to persons *slain* by wounds; and, so far as *officers* are concerned, its provisions were entirely retrospective—covering those cases, and those only, in which officers *had* been *slain* in the line of their duty, between the 18th of July, 1812, and the date of the law.

According to the construction thus given to these two acts, White, if an *officer*, was embraced in the act of 1813, and not in that of 1814; but, if not an officer, he was not embraced in either: not in the act of 1813, because that act is confined to *officers*; and not in that of 1814, because that is confined to persons *slain*, and did not extend to deaths by casualties.

But it is to be observed that the act of the 4th of March, 1814, was subsequently extended by the amendatory act of the 3d of March, 1817, so as to include *officers* as well as *seamen* in all cases, and so also as to include deaths by disease and casualties; and that, under this amendatory act, Mrs. White would have been entitled to a pension, whether her husband be considered as an *officer* or a *seaman*. It is true that the amendatory act of 1817 was repealed by the act of the 22d of January, 1824, but with a saving of pensions already granted, and of all rights accrued under it.

So much, then, may be considered as certain, viz: that Mrs. White, provided her husband be regarded as an *officer*, was entitled, under the act of 1813, at her husband's death—and, if not an officer, then under the act of the 3d of March, 1817, from the date of that act—to the ordinary pension of five years' half pay.

Then comes the act of the 16th of April, 1818, in addition to the act of the 4th of March, 1814; but, as both sections of this law relate exclusively to persons who served in private armed ships, they have no bearing on the present case, and may be laid out of view.

Next in order of time is the act of the 3d of March, 1819, ex-

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tending the term of half-pay pensions previously granted by law to the widows and children of certain officers, seamen, and marines who had been killed or died in the naval service, for an additional term of five years. But this act did not apply to Mrs. White's case, whether her right be regarded as commencing under the act of 1813, or under that of 1817; because it is expressly confined to the cases of persons killed or dying "during the late war;" and White was killed in May, 1815, after the termination of the war. The same remark must be made as to the act of the 22d of January, 1824, "further extending the term of half-pay pensions," &c.; the acts of the 9th of April, 1824, or the 26th of May, 1824, (which are, moreover, confined to private armed ships;) and the 1st section of the act of the 23d of May, 1828, "extending the term of certain pensions chargeable on the navy and privateer pension funds."

But the act of the 28th of June, 1832, "further to extend the pensions heretofore granted to the widows of persons killed, or who have died, in the naval service," is not confined to cases which occurred during the war. It provides "that, in all cases where provision has been made by law for the five years' half-pay to widows and children of officers, seamen, and marines who were killed in battle, or who died in the naval service of the United States, and, also, in all cases where provision has been made for extending the term of five years, in addition to any term of five years, the said provision shall be, and is hereby, further extended for an additional term of five years, so far as respects widows only; to commence at the end of the current or last expired term of five years, in each case, respectively."

This latter act embraces the case of Mrs. White, and adds five years to the five years before allowed by the act of 1813 if her husband was an officer, and by that of 1817 if he be regarded as a seaman merely; thus making the pension equal to ten years' half-pay.

The last act to be referred to is that of the 30th of June, 1834, which provides, among other things, that all the provisions and benefits of the act of the 28th of June, 1832, "be continued for another term of five years to all those widows who have *heretofore* had the benefit of the same."

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Having thus collected and examined the various statutes by which, as I suppose, the case must be determined, I proceed to inquire whether the benefit of these laws, or any of them, ought now to be extended to Mrs. White.

I find this question substantially answered by the opinions of my predecessors. In an opinion dated the 9th of June, 1825, and transmitted under that date to the Secretary of the Navy, the Attorney General speaks of the rights acquired by the widow under the 1st section of the act of March 4, 1814. Here is a certain right which the law says shall accrue to the widow on the happening of a certain event—that of her husband having died by reason of a wound received in the line of his duty on board of a private armed vessel. The law does not require either that an application should be made by her, or that any thing else should be done in order to consummate her right. It is consummated by the mere fact of the death of her husband under the circumstances already mentioned. It is a vested right to so much money per annum, for five years—subject, however, to be discontinued and defeated by her death or marriage at any time within that term; but a vested and perfect right during the time that she continued to live the widow of the deceased husband, and not defeated by her subsequent intermarriage, except from the time at which such intermarriage takes place.

Such I understand to have been the uniform practice under this act ever since its adoption; and I confess that I see no reason for changing the practice. Although the foregoing observations were made in reference to a case arising under the 1st section of the act of 1814, (which section relates to *private armed ships*,) the principle laid down by the Attorney General is equally applicable to other cases.

He also says that the right of pension does not depend on the *necessities* of the parties. “It is given to the widows and children of officers and men, of rich and poor, without regard to their circumstances. It is in the nature of an absolute engagement or promise made to those officers and men, that if they fall in the service of their country, so much shall be paid to their wives and children, without inquiry into the fact whether they stand in need of it or not. Nor is there any

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condition annexed to the promise, that the money shall be paid if applied for in a given time, or in a given state of things. It is bottomed only on the single condition that the husband and father shall die in the service of his country; on the happening of which condition, the public engagement becomes a *debt*, which is as much *property*, and the property of the widow and children, as any bond which the deceased may have left to them by his will."

He therefore affirmed the validity of the practice which had obtained, as then stated to him, in the Navy Department.

In accordance with these views, I am therefore of opinion that Mrs. White is now entitled to receive the pension for five years, secured to her by the act of 1813, or by the act of 1817, as you may decide in respect to the class to which her husband belonged—(in the first, the five years will have ended the 18th of May, 1820; in the latter, on the 3d of March, 1822;)—and also for the additional five years given by the act of 1832.

In an opinion dated the 27th of October, 1832, and transmitted to the Secretary of the Navy, the Attorney General decided that the act of June 28, 1832, embraced in its provisions the widows of the different classes therein mentioned; "and that the pension of the widow, in each case, is to commence at the end of the current or last expired term of five years." The five years added by this law will therefore have expired, in the one case, on the 18th of May, 1825; and, in the other, on the 3d of March, 1827.

In regard to the law of June, 1834, my first impression was that it did not include Mrs. White's case; because it seemed to me, on a cursory examination of the act, that "she had not heretofore had the benefit" of the act of the 28th of June, 1832. But, on further reflection, I am inclined to think that Congress, by those words, meant merely to require that the widow should be one who was embraced within the law of 1832, and therefore entitled to its benefits; and who, in that sense, might be said to have "had the benefit of the same;" and that they did not intend to make the actual receipt and enjoyment of the pension prior to the 30th of June, 1834, a condition precedent to the operation of the act of that date. I am confirmed in this opinion by another point adopted and

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decided by the Attorney General in the opinion of the 9th of June, 1825, before referred to. He remarks, in reference to the language of the acts of the 16th of April, 1818, and the 9th of April, 1824, extending pensions previously granted, (the first of which extending acts is confined to cases "where a person has been put on the pension-list or granted a certificate of pension," under the former law; and the other of which is confined to the "pensions of persons who now are in the receipt thereof,") that he understands, "if a widow, whose rights commenced under the act of 1814, now, for the first time, makes an application for her pension under *all* the past acts, no difficulty arises to her now receiving all that these acts give her, provided that she still remains the widow of the deceased. I understand, also, that even where she has since intermarried before she has made any application, or has died before she has made any application, the uniform practice of the department has been not to consider the application too late for all that was due at the time of her intermarriage or death; the department having heretofore considered that as having been done which ought to have been done. It is a liberal exposition of these acts, in advancement of the public policy on which they were founded; and I see no sufficient cause to disturb it by recommending a change."

The language of the act of 1834 is certainly not so strong as that used by either of the acts first referred to; and I have, therefore, the less hesitation in applying the principle of the above extract. This will add another term of five years, to commence from the passage of the act of 1834.

The result, then, is, that according to the laws, usages, and decisions above stated, Mrs. White is entitled to a pension of *ten* years prior to the act of the 30th of June, 1834; and, under the latter act, to a pension of *five*, to commence from the day of the passage thereof.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Liability of Marshals and Rights of Execution Debtors.

LIABILITY OF MARSHALS AND RIGHTS OF EXECUTION DEBTORS.

Marshals are liable to account to the United States for moneys paid to their deputies on execution, even though the return day of the execution may have passed; and defendants in such execution who shall have paid money on the same after the return day, are entitled to be credited at the treasury for such payments.

ATTORNEY GENERAL'S OFFICE,
April 7, 1836.

SIR: I have had the honor to receive your letter of the 25th ultimo, in relation to the case of Col. William Tennille.

It appears from the communication of the Second Comptroller, and the documents referred to by him, that in 1823 the United States recovered, in the district court for the district of Georgia, a judgment against Colonel Tennille, on which an execution was duly issued to the marshal, tested the 12th August, 1823, and returnable at the next November term of the court. This execution was placed by the marshal in the hands of one of his deputies to be executed. It was not returned according to the exigency thereof, nor does it appear that any step was taken thereon prior to the return day. After the return day, certain property of the defendant was levied on by the deputy marshal; but, as would seem, never sold by him, nor has the execution ever been returned. But, after the return day, several payments were made on the execution by Colonel Tennille to the deputies of the marshal, which were duly endorsed on the execution, but parts only of which were paid over by them to the marshal, and by him to the United States. Colonel Tennille claims to receive a credit for the whole sum thus paid by him to the deputies, and by them endorsed on the execution. But the Third Auditor has disallowed the credits claimed, except for so much as was paid to the marshal; being of opinion, in respect to the residue, that as the execution was out of date when the money was paid to the deputy marshal, the *marshal* cannot be held to account therefor to the United States. Colonel Tennille having appealed to the Second Comptroller, that officer desires my opinion on the question "whether Colonel Tennille is legally discharged from his liability on the execution, in the full amount by him paid

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to the deputies of the marshal, and by them endorsed on the execution; or only for that part by him paid to the deputies, which, in good faith, was paid over to the United States?"

The objection of the Third Auditor is founded on the assumption that the moneys in question were not paid during the life of the execution; and but for certain laws of the State of Georgia, which do not appear to have been laid before him, there would certainly be much reason for that view of the case. It must also be admitted, as a general rule, that an execution not begun to be executed before its return day cannot afterwards be proceeded on. According to the English practice, and to that of most of the American States, it must be returned, and new process must be issued in its stead. In some of the States, however, the execution may be renewed; and that seems formerly to have been the course in the State of Georgia. But as early as 1799, (and perhaps even at an earlier date,) the statutes of Georgia expressly provided that all executions issued out of the courts of that State "shall be of full force until satisfied, without the same being obliged to be renewed on the court roll from year to year, as heretofore practised;" and by the act of Congress of the 19th of May, 1828, executions in the courts of the United States, and the proceedings thereon, are to be the same as were then used in the courts of the States respectively, unless subsequently altered as authorized by this act. But as all the payments in this case were made before the passage of the act of 1828, the case must be governed by the judiciary act of September, 1789, which declared that the proceedings on executions, and other process in the courts of the United States, should be the same in each State as were then used in the supreme court of such State, subject to such alterations and additions as might be made by the courts of the United States. I have not been able to ascertain whether the statutory regulation above quoted from the laws of Georgia was in force in September, 1789; or, if not then in force, whether it had been adopted by the district court of the United States prior to 1828. From the course taken by the marshal and his deputies on the execution against Colonel Tennille, I should infer that the modern Georgia practice was understood to be in force; and if it was, then there can be no doubt

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as to the right of Colonel Tennille to the credits claimed by him.

If I could suppose that the claim of Colonel Tennille turned exclusively on the question whether the execution was in life at the time when the payments were made by him, I should suspend my opinion until that question could be decided by a proper appeal to the district court of Georgia. But as I am well satisfied that his right to be credited for all the moneys paid by him in the present case does not necessarily depend on the decision of that question, I do not think it needful to subject him or the United States to the expense and delay of such an appeal.

Supposing the English rule, as above stated, to be applicable to the present case; and yet I have no doubt that Colonel Tennille is entitled to the credits in dispute.

The execution, when delivered to the marshal, and when placed by him in the hands of his deputies, was a valid and regular process; and it was the duty of the marshal, if the law did not permit it to be executed after the return day, to make a levy before that day, so as to preserve it in life; or, if that could not be done, to return it to the court from which it emanated, so that another might be issued in its place. By keeping it in his own hands, or in the hands of his deputies, unreturned, he continued, as between himself and the plaintiffs, his official relation and liabilities in respect to it; and though no *levy* could legally be made thereon, yet, if made, it was only for the *defendant* to take advantage of the irregularity; and if he chooses to submit to the execution of the process, or to prevent it, by paying to the marshal the money demanded by him in virtue of that process, surely it is not for the latter to take advantage of his own wrong. He is responsible to the plaintiffs, because, through his authorized deputies, he has received moneys for the plaintiffs' use, on an execution regularly issued to him, which was valid when he received it, and which, as between him and the plaintiffs, is yet valid; and for the like reason, and also because the moneys were demanded and received by color of office, the sureties of the deputy are responsible to the marshal, and those of the marshal to the plaintiffs.

Pay of Navy Captains.

It is suggested, in some of the papers before me, that the marshal had brought a suit in the State court, against one of the deputies and his sureties, to recover the money received by such deputy; but failed therein, as against the *surety*, on the ground that the deputy marshal, in receiving the money, after the return day, did not act *officially*, but as the mere private agent of the marshal; and it is therefore argued, that Colonel Tennille, by making the payments at that period, deprived the marshal of his recourse to the sureties of the deputy, and ought not to be credited therefor. On referring to the record of this suit, I find that the rule setting aside the verdict and awarding a new trial is not placed on the ground above stated, but solely on the ground that there was no evidence of any damage sustained by the marshal. But even had the court proceeded on the principle supposed, it would not have varied my opinion; because the United States, not being parties to the suit, could not be affected by it; and because the liability of the deputies' sureties to the marshal is not necessarily the test of the liability of the marshal and his sureties to the United States. Much less is it the test of the right of a defendant, who has paid his money to an officer acting under color of process, to be credited for the amount of such payment. I have no doubt the sureties of the marshal and of the deputy were liable, in this case, with their respective principals; but even if they were not liable, I think it very clear that the defendant is not to lose his money, because the plaintiffs and their officers used the process of the court in an irregular manner.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PAY OF NAVY CAPTAINS.

In order to entitle a captain to the annual pay of four thousand dollars per annum, given by the act of 3d March, 1835, he must be in actual command of a squadron on a foreign station.

ATTORNEY GENERAL'S OFFICE,

April 13, 1836

SIR: In reply to your letter of the 8th instant, I have the honor to state, that, in my opinion, a captain must be in the

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When Acts of Congress take Effect.

actual command of a squadron on a foreign station, in order to entitle him to the annual pay of \$4,000 given by the act of the 3d of March, 1835. This, it appears to me, is the necessary effect of the language of the law, which takes the place of all prior regulations and usages on the subjects embraced in it.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

WHEN ACTS OF CONGRESS TAKE EFFECT.

Acts of Congress containing no provision as to the time when they shall take effect, go into effect upon their receiving the approbation of the President.

In general, the law does not notice fractions of a day; yet where questions of right growing out of deeds, judgments, and other instruments bearing the same date, are concerned, the precise time of approval may be inquired into, to prevent laws from operating retrospectively.

ATTORNEY GENERAL'S OFFICE,

April 13, 1836.

SIR: In answer to the question proposed in the communication of the Second Comptroller enclosed in your letter of the 11th of February last, I have the honor to state, that a law of Congress which contains no provision as to the time when it shall take effect, commences and takes effect, as a law, from the moment it receives the approbation of the President; and that, as a general rule, it is not competent to go into a division of a day; there being, in contemplation of law, no fractions of a day. But this rule is not universal; and when questions of right growing out of deeds, judgments, and other instruments bearing the same date, are concerned, the precise time is allowed to be established. If it be true, in point of fact, that the act of the 3d of March, 1835, did not receive the President's signature until after office hours on the 3d of March, then a right had been acquired by Major Hunt, which ought to be protected; and for that purpose I am of opinion, in analogy to the excepted cases just alluded to, that the precise time may be inquired into. This is also necessary in order to prevent the law from operating retrospectively for a part of the day on which it commenced.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Brevet Pay of Officers of Ordnance Department.

BREVET PAY OF A BREVET BRIGADIER.

To entitle a brevet brigadier general to pay according to his brevet rank, he must be in command of a brigade regularly consisting of two regiments.

ATTORNEY GENERAL'S OFFICE,

April 13, 1836.

SIR: I have had the honor to receive your letter of the 6th instant, covering sundry papers in relation to the claim of Brevet Brigadier General Armistead for brevet pay.

According to the standing regulations of the War Department, and the various opinions of my predecessors in office, a brigadier general by brevet, to be entitled to pay corresponding to his brevet rank, must be in command of a brigade, which, regularly, must consist of two full regiments. Whether the force under command of General Armistead can with propriety be denominated a brigade, is a question depending very much on military science and usage, and on which I must, therefore, decline expressing any opinion.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

BREVET PAY OF OFFICERS OF ORDNANCE DEPARTMENT.

The act of April 16, 1818, has excluded officers of the Ordnance Department from the benefits of their brevet rank.

ATTORNEY GENERAL'S OFFICE,

April 13, 1836.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, transmitting sundry papers in relation to the claim of Major Baker, of the Ordnance Department, for brevet pay.

Without entering into the question whether it was right in Congress to exclude officers belonging to the Ordnance Department from the benefits of their brevet rank, it is sufficient that, according to the construction given by my predecessors and myself to the act of the 16th of April, 1818, they have done

Extra Pay of Acting Assistant Commissary &c.

so. I beg leave to refer you to my opinion of the 30th of June, 1834, in the case of Colonel Thayer, and to the opinions therein referred to.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

EXTRA PAY OF ACTING ASSISTANT COMMISSARY AND QUARTERMASTER.

The extra compensation and allowances given by the regulations in force at the time of the passage of the act of the 3d of March, 1835, were authorized by law.

The eighth section of the act of the 2d of March, 1821, was enacted as a permanent provision; and as it has never been repealed nor abrogated, is yet in force.

The payment of army contingencies is authorized by law; and, as Congress have not defined in the law itself what those contingencies are, the Secretary of War must be admitted to possess a very liberal discretion on the subject. If the allowances made by the Secretary of War prior to the 3d of March, 1835, to officers of the army, from the appropriation for army contingencies, were really for contingencies, they were authorized by law.

ATTORNEY GENERAL'S OFFICE,

April 16, 1836.

SIR: In your communication of the 13th of February last, transmitting a statement of the claim of Major Dade for extra compensation while performing the duties of acting assistant commissary and quartermaster, with a report of the Quartermaster General thereon, you request my opinion upon the following points presented in the report, viz:

1. Were the extra compensation and allowances which were provided for by the regulations in force at the time the act of March 3, 1835, was passed, authorized by law, because of the power vested by the 9th section of the act of April 24, 1816, to alter the regulations? And, as a consequence, is Major Dade entitled to additional compensation as acting assistant quartermaster and acting assistant commissary of subsistence; he having performed both duties, and which additional compensation was fixed by the regulations at \$20 per month?

2. Is the 8th section of the act entitled "An act to reduce

Extra Pay of Acting Assistant Commissary, &c.

and fix the military peace establishment," &c., approved March 2, 1821, now in force? And, if not, is there any legal authority for requiring an assistant commissary of subsistence to perform the duties of assistant quartermaster, and *vice versa*? and, if so, what is that authority? And under what authority is the additional compensation of assistant commissaries regulated from \$10 to \$20 per month, when, by the 6th section of the act of April 14, 1818, it is fixed at \$20 per month?

3. Were the allowances which were made by the Secretary of War to officers of the army, and not provided for by regulations, prior to the 3d of March, 1835, from the appropriations for army contingencies, authorized by law, because of that fund being subject to his exclusive control?

Having carefully examined the several acts of Congress applicable to these questions, I have the honor to submit for your consideration the following replies to them:

1. The extra compensation and allowances given by the regulations in force at the time the act of the 3d of March, 1835, was passed, were, in my opinion, authorized by law; but I do not derive this authority from the implied power to alter the regulations conferred by the 9th section of the act of the 24th of April, 1816. The regulations in question were originally founded upon the 8th section of the act of March 2, 1821; and as that section is, in my opinion, yet in force, they are yet supported thereby. The latter question under the first point is superseded by the answer just given.

2. In my opinion, as already suggested, the 8th section of the act of the 2d of March, 1821, is yet in force. This section was enacted as a permanent provision; and has never been expressly repealed nor abrogated by any inconsistent provision. It is, however, suggested, in the report of the Quartermaster General, that this section has been impliedly repealed by the acts of the 2d of March, 1829, and the 3d of March, 1835, in relation to the supplying the army. The first of these laws declares that the 6th, 7th, 8th, 9th, and 10th sections of the act of the 14th of April, 1818, and the 8th section of the act of the 2d of March, 1821, shall be continued in force for five years from the passing of the act, and until the end of the next session of Congress thereafter, and no longer; whilst the act

Extra Pay of Acting Assistant Commissary, &c.

of 1835 only rendered permanent the 7th, 8th, 9th, and 10th sections of the act of 1818. The 8th section of the act of 1821 is not enumerated in the act of 1835; and the period limited in the act of 1829 having expired, the first impression certainly is, that that section is no longer in force. But, on recurring to the history of this provision, and to the reason and spirit of the law, I think it will be clearly seen that it could not have been the intention of Congress to repeal this section.

The Subsistence department, as now constituted, was organized by the 6th section of the act of the 14th of April, 1818, and regulated by the 7th, 8th, 9th, and 10th sections of that act. These sections were all limited in their duration to five years, and to the end of the next session of Congress thereafter. Before the expiration of that period, the organization of the department was essentially varied by the 8th section of the act of 1821; which was a permanent provision. By the act of the 23d of January, 1823, the 7th, 8th, 9th, and 10th sections of the act of 1818 were continued for five years, and until the end of the next session of Congress thereafter. It was then, it seems, well understood by Congress that it was unnecessary to continue the 8th section of the act of 1821; nor did they enumerate the 6th section of the act of 1818 among the sections to be continued—probably because they supposed that the whole of that section had been abrogated by the 8th section of the act of 1821. In truth, however, there were some matters provided for by the 6th section of the act of 1818, in relation to the rank and pay of the Commissary General, the official bonds, &c., which were not covered by the 8th section of the act of 1821; and it would therefore have been more correct to have continued so much of the 6th section of the act of 1818 as had not been abrogated by the law of 1821. When the act of 1829 was passed, Congress seem to have been aware of this; and it is to be presumed that it was for this reason that the 6th section of the act of 1818 was so carefully enumerated with the other sections. But, in order to show that they did not intend to revive that section in its original form, in those respects in which it has been altered by the act of 1821, they also name, with the other enumerated sections, the 8th section of the latter act. The good sense of the law of 1829, there-

Extra Pay of Acting Assistant Commissary, &c.

fore, is, that the 6th section of the act of 1818, as modified by the 8th section of the act of 1821, is to be in force for five years, and no longer, &c. This is also its necessary legal effect: because the two sections, being in several material respects inconsistent with each other, could not both have effect according to their terms.

In the act of 1835 there is no reference either to the 6th section of the act of 1818, or to the 8th section of the act of 1821. It may, therefore, well be that those parts of the 6th section of the act of 1818, which were untouched by the act of 1821, may not now be in force; but it by no means follows that the 8th section of the act of 1821 is impliedly repealed. There was no necessity for naming the 8th section of the law of 1821, unless the 6th section of the law of 1818 was first named; because the law of 1821 was a permanent law, and always in force; and because, also, the 8th section had been named in the act of 1829, not for the purpose of reducing it from a permanent to a temporary law, but, as has been above shown, merely for the purpose of preventing the revival of the 6th section of the former law in all its original efficacy. In other words, the law of 1829 merely provides, in reference to this point, that the 6th section of the act of 1818, as modified by the 8th section of the act of 1821, shall be in force for five years, &c., and no longer. This provision has not been continued by the act of 1835; and the section of the law of 1818 is, therefore, no longer in force. But the 8th section of the act of 1821, having never been repealed or superseded by any subsequent law, is yet, by virtue of its original enactment as a permanent law, in full force.

I will only add, that the 2d section of the act of 1835, and, indeed, the whole of that law, necessarily supposes the continued existence of the Subsistence department; which is not the case, unless the 8th section of the law of 1821 is yet in force. Even, therefore, if the reason of the whole case were less plain than it appears to be, we should be authorized to exempt the 8th section of the act of 1821 from any implied repeal; such implications being easily rebutted by evidence of a contrary intent on the part of the law-maker.

The conclusion to which I have come, in respect to the 8th

Extra Pay of Acting Assistant Commissary, &c.

section of the act of 1821, disposes of the other questions under the second head.

3. If the allowances made by the Secretary of War, prior to the 3d of March, 1835, to officers of the army, from the appropriation for army contingencies, were really for contingent expenses of the army, then, beyond all doubt, they were authorized by law. In one sense, this appropriation is subject to the exclusive control of the Secretary of War, acting under the direction and with the authority of the President, as commander-in-chief of the army—that is to say, the Secretary of War, in the exercise of good faith and sound discretion, is authorized to pay out of this fund, to officers and other persons, as occasion may require, all such expenses as may be actually and necessarily incurred in the *support* of the army, and for which no express provision is made by law. This is his general authority, and it necessarily includes the power of deciding, in all cases of this sort, on two questions: 1st. Whether it be expedient to incur any particular contingent expense or not? 2d. When any such expense has been incurred, what is the proper allowance to be made for it? And so long as he acts in good faith, and with ordinary care, in his decisions on these questions, (provided the expense be one that really comes within the description of “contingencies for the army,”) he cannot be held responsible for any error of judgment, nor can his application of the fund be overhauled. But he is not authorized to apply any part of this fund to other purposes than contingencies of the army; and if any of those allowances which are prohibited by the act of the 3d of March, 1835, were previously paid out of this fund as “*army contingencies*,” I do not think they can now be so paid, under the notion of their being “*authorized by law*.” The payment of army contingencies is certainly “*authorized by law*,” and as Congress have not defined in the law itself what those contingencies are, the Secretary of War must be admitted to possess a very liberal discretion on the subject; but I conceive that the express inhibitions contained in the act of the 3d of March, 1835, are so far restrictive of his discretion as to make it unlawful to apply any part of the contingent fund to any one of the purposes denounced by the law. Whatever they may have been before, they are no

Power and Jurisdiction of the Orphans' Court of Washington.

longer "army contingencies." It is easy to see that, unless this limitation be adopted, the prohibitory enactments of the act of the 3d of March, 1835, may be evaded, and, to the extent of the appropriation for army contingencies, entirely defeated.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

POWER AND JURISDICTION OF THE ORPHANS' COURT OF WASHINGTON.

The orphans' court of the county of Washington has power to grant letters of administration in respect to assets existing in the county, and payments made by the Treasury Department, to an administrator thus appointed, are regular; yet, in a case where the decedent resided in Baltimore, and left a will appointing an executor there, and letters granting administration *de bonis non* are afterwards granted in Maryland upon the same estate, the letters issued in Washington become subordinate to them.

ATTORNEY GENERAL'S OFFICE,

April 18, 1836.

SIR: I have had the honor to receive your communication of the 25th of February last, in relation to the conflicting claims of Messrs. Law and Tucker to receive the moneys yet unpaid on the award under the Neapolitan treaty, in favor of the executor of Hugh Thompson, deceased.

It appears from the letters of the claimants, that soon after the death of the executor, letters of administration *de bonis non* of the estate of Mr. Thompson were granted by the orphans' court of the county of Washington to Mr. Law, by authority of which he received in money the share of the first instalment, and certificates for the balance, which he has since transferred to a third person, represented to be the agent of parties having claims against the estate.

At a still later date, letters of administration *de bonis non*, of the same estate, were granted by the proper court in the city of Baltimore (the domicil of Mr. Thompson) to a Mr. Tucker; the latter being the person who, according to the laws of Maryland, was entitled to administration. It is not suggested

Pre-emptions to Aliens.

that there are any debts due from the estate to persons residing in this District.

The power of the district court to grant letters of administration in this case, in respect to the assets existing here, is unquestionable; and the payment of the money and delivery of the certificates to Mr. Law were therefore regular. But as both Mr. Thompson and his executor were residents of Baltimore, the orphans' court of that city was the more appropriate court for granting administration *de bonis non*. And there is no doubt that the administration in this District must, from the date of the letters of administration granted in the city of Baltimore, be deemed subordinate to the latter administration; and it is possible that the orphans' court of the county of Washington may revoke the letters granted by it. But, until revoked, all payments in this District, of debts existing here, to Mr. Law, or his authorized agent, will be valid.

It is certainly competent for the department to withhold payment of the certificates until the rights of the parties shall have been judicially determined; and there would seem to be much reason for that course in this case. But the propriety of such a step is a question of discretion, on which it is not the province of the Attorney General to advise. I take the liberty, however, to refer to some observations on the proper mode of exercising this discretionary power, contained in my opinion in the case of Messrs. Callaghan and Stewart, and more especially in the opinions of my predecessors therein referred to.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PRE-EMPTIONS TO ALIENS.

Pre-emption accrues to aliens under the acts of 1830 and 1834, especially where the local law authorizes them to hold and convey real estate.

ATTORNEY GENERAL'S OFFICE,

April 18, 1836.

SIR: In your letter of the 8th instant, you request my opinion on the following question arising under the pre-emption acts of the 29th May, 1830, and the 19th June, 1834:

Assignees of Pre-emption Certificates.

“Does the right of pre-emption, granted by said acts, accrue to persons who were not citizens of the United States at the time of the passage of said acts?”

In reply to your inquiry, I have the honor to state, that I find nothing in either of these acts to limit their operation to citizens of the United States. The words “every *settler* or *occupant* of the public lands,” are sufficiently broad and comprehensive to include aliens; and as it must have been well known to Congress that the public lands were, in many cases, in the possession of persons not actually citizens of the United States, it is not to be believed they would have used these general terms, had they designed to confine the benefit of these laws to citizens merely. Aliens, if actual settlers, were within the policy of these laws; and though, as a general rule, they cannot hold lands against the State, yet, according to the laws of most (if not all) of the American States, they may take lands by grant, and may hold the same till divested by forfeiture, on office found, or by death and escheat. The words of the law being sufficiently general to embrace all persons capable of taking and holding lands under letters patent from the United States as against them, and aliens having this capacity, I am of opinion that your question must be answered in the *affirmative*.

Had I any doubt on the general question, I could entertain none on the particular case mentioned in the postscript, provided the local laws of the State of Illinois allow aliens to hold and convey lands as you suppose.

I have, &c.,

B. F. BUTLER.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

ASSIGNEES OF PRE-EMPTION CERTIFICATES.

The assignee of a pre-emption certificate takes it subject to the equities subsisting between the settler and the United States.

The legal title is in the United States until a patent issues; and where the equities are equal, the legal title will prevail.

Assignees of Pre-emption Certificates.

A purchase without notice is a good defence against a suit, but not good ground to maintain one, even in cases where the doctrine is applicable.

ATTORNEY GENERAL'S OFFICE,

April 18, 1836.

SIR: I have had the honor to receive your letter of the 6th of February last, transmitting a letter from the Commissioner of the General Land Office, and an accompanying argument; in the latter of which papers it is mentioned that "whatever control the General Land Office may have over a pre-emption in first hands, after it has been allowed by the register and receiver, the pre-emption certificate assigned is beyond the reach of the Commissioner and Secretary of the Treasury, and unquestionably in the hands of a *bona fide* assignee without notice."

My opinion being requested on this subject, I have carefully examined the pre-emption laws on which the question arises, and have also considered the argument enclosed to me. The result of my reflections is, that the assignee of the pre-emption certificate (supposing it, for the purposes of this opinion, to be assignable) takes it subject to all the equities existing between the original parties—the United States and the settler to whom it was given—even though he had no notice of such equities at the time of the assignment and payment of the purchase-money; and that he can require a specific execution of the engagement contained in the pre-emption laws, on no other terms than could have been insisted on by his assignor, the original vendee.

The error of the argument in favor of the assignee consists in assuming that the equities of the parties are merely equal, and that the legal title is in the assignee. The legal title, until letters patent shall have issued, is in the United States; and if their equity is merely equal to that of the assignee, yet it must be preferred, because they have the legal title. The doctrine as to purchasers for a valuable consideration without notice, is inapplicable for another reason. If this were a case in which the parties were both suable, the appropriate remedy of the assignee, to compel the vendor to complete the title, would be by a bill in equity for a specific performance: in other words,

Authority of Registers and Receivers.

as the United States are in possession, and refuse to convey, the assignee must necessarily be the plaintiff. But a purchase for a valuable consideration, without notice, is not ground on which to maintain a suit—it can only be used as a defence; it is a mere shield, and not a weapon of attack.

In all cases of this sort, the rule *caveat emptor* is particularly applicable; and if the assignee has chosen to part with his money without providing suitable means of indemnification to meet the contingency of a failure of title in his assignor, he must submit to the consequences of his indiscretion.

I have, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

AUTHORITY OF REGISTERS AND RECEIVERS.

Decisions of registers and receivers upon the facts offered to establish pre-emption rights, under the act of 29th May, 1830, are conclusive.

They act in a judicial capacity in weighing and deciding upon the sufficiency of the evidence offered; and although they are to observe the rules prescribed by the Commissioner of the Land Office, they cannot be compelled to act upon any judgment but their own.

The issuing of patents, however, depends on the Commissioner, who may suspend them where the decisions were obtained by fraud, or founded in material errors of fact or law.

ATTORNEY GENERAL'S OFFICE,

April 21, 1836.

SIR: I have had the honor to receive your letter of the 15th instant, in which you request my opinion on the following questions:

“1. Whether the absolute decision of the register and receiver under the pre-emption acts of the 29th May, 1830, and 19th June, 1834, by which a preference in the right of purchase is awarded to individuals, in virtue of possession and cultivation, is subject to reconsideration by the Commissioner of the General Land Office, and this department, before issuing a patent?”

“2. Whether the same can be reversed for what may on inquiry appear to have been a mistake in opinion merely, on either the law or the fact?”

Authority of Registers and Receivers.

"3. Whether the decision of the register and receiver, that the proof of cultivation and possession was satisfactory, can be revised, and new or additional evidence be received here, or a new or different decision be made here on the old evidence, so far as it may be reported to the Land Office?"

The points involved in these questions have been substantially decided by one of my predecessors.

In an opinion bearing date the 28th of August, 1819, the Attorney General decided that, under the pre-emption law of the 5th of February, 1813, the power of ascertaining and deciding on the facts which entitle a party to the right of pre-emption was exclusively vested in the register and receiver of the land district in which the lands were situated, without any power of revision elsewhere. The language of the law on which this decision was made, is very nearly the same with that of the act of the 29th of May, 1830, on which your questions arise. The proof of settlement or improvement is, in each case, to be made to the satisfaction of the register and receiver; the only material difference is, that by the act of 1830 such proof is to be made "agreeably to the rules to be prescribed by the Commissioner of the General Land Office for that purpose." This, however, in my judgment, does not vary the matter.

The Commissioner of the General Land Office is to prescribe, in advance, such general rules in regard to the mode and nature of the proof to be made, as he shall think suitable; and those rules are to be observed and conformed to by the register and receiver. But the proof adduced in conformity to such rules is in each case to be received, considered, and decided on, by the register and receiver. In weighing the evidence, and in deciding on its sufficiency, these officers act in a judicial capacity: if it proves to their satisfaction that the settlement and improvement required by law have been made, they must allow the entry; if it fails to satisfy them of those facts, they must disallow it. The law has not authorized any other officer to reverse or revise their decision; nor can they be compelled to decide according to the dictates of any judgment but their own.

But though the register and receiver of the land district in

which the land is situated are made, by law, the exclusive judges of the sufficiency of the proofs, on all claims to pre-emption rights under the acts in question, it does not, therefore, follow that letters patent are in all cases to be issued by the General Land Office, on the certificates of purchase granted by them. No doubt it would have been competent for Congress to have annexed such a consequence to that certificate. But they have not chosen to say that, whenever an entry is allowed and a certificate granted by the register and receiver, a patent shall be issued; nor to make any provision which I can think tantamount to this. On the contrary, they have contented themselves with providing that, when proof of settlement and cultivation shall have been made to the satisfaction of those officers, the party shall be authorized to enter any number of acres, not more than 160, or a quarter section, to include his improvements, upon paying to the United States the minimum price, &c. The issuing of the patent is thus left to depend on the general duty of the Commissioner of the General Land Office, and on the various acts of Congress by which that duty is prescribed; and all these cases must, therefore, be understood to stand on precisely the same ground, so far as the right to demand and the duty to execute a patent are concerned, as that occupied by the ordinary entries and certificates of purchase.

I infer from the opinion of my predecessor, delivered in 1827, in a case arising under the act of the 17th of February, 1815, for the relief of the inhabitants of New Madrid, in Missouri, that the General Land Office has always exercised the power of suspending the execution of patents, in cases of serious doubts or of conflicting claims, until the direction of Congress or the decision of a competent tribunal can be obtained. In the opinion last mentioned, this practice is approved and its legality maintained by the Attorney General. The nature of this case and the grounds of the opinion will sufficiently appear by the following extract: "Mr. Bates demands the patent, because, however the facts may be, he has produced the patent certificate; and the issuing the patent is an act so purely ministerial, that the officer is bound to issue it, although he may see distinctly that it is about to issue for lands not at all sub-

ject to the claim; that is to say, the President of the United States, whose peculiar constitutional function it is to see that the laws are properly executed, is himself to become instrumental in a conscious breach of these laws by signing the patent, because an inferior officer has originally taken a false step in giving what Mr. Bates calls a *patent certificate*. I am not of this opinion; on the contrary, I think it most proper that all executive action on the subject should cease until the judiciary shall have decided on the claim."

In a subsequent opinion, bearing date the 22d of October, 1828, the Secretary of the Treasury was advised by the Attorney General that no patent ought to issue for lands which have been inadvertently sold without any legal authority to sell them, the mistake having been brought to the knowledge of the Commissioner of the General Land Office before the emanation of the patent.

I have no doubt as to the soundness of these opinions; and in reference to cases arising under the pre-emption laws of 1830 and 1834, I think it very clear that the Commissioner of the General Land Office may lawfully suspend the execution of letters patent in every case where he shall be satisfied that the decision of the register and receiver was obtained by fraud, or was founded on material error of fact or of law, until the decision of the judiciary or the direction of Congress can be obtained. The power thus to suspend the issuing of a patent fairly results from those clauses of the constitution which require the President to take care that the laws be faithfully executed, and which vest in him the executive power. By the express provisions of the acts of Congress, letters patent for lands are to be signed by the President, or by his secretary in his name; and the General Land Office is moreover a branch of the Treasury Department, and thus a part of the Executive. The Commissioner of the General Land Office, in the exercise of his ordinary and appropriate functions, thus represents the President, and acts with his authority. If he sees that the register and receiver, through corruption, ignorance, or any other cause, have allowed pre-emption claims not authorized by law, he may well suspend the execution of the patent until he can take the direction of the head of his department; and,

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with the sanction of that head, the execution may be still further suspended until the direction of Congress or the decision of some competent judicial tribunal shall have been obtained.

It is perhaps needless to add that the power of withholding the execution of a patent when the regular certificates have been produced ought not to be exercised except on strong grounds. It is equally obvious that the particular course to be adopted when the application for a patent has been suspended must, of necessity, depend on the peculiar circumstances of each case. Where there are conflicting claims, the parties may be left to liquidate and settle them in the judicial tribunals. Where the controversy is exclusively between the government and the individual claimant, who has received or who holds the certificate of purchase, it would seem to be equitable and just, as the government cannot be sued, that it should institute some appropriate legal proceeding for the purpose of trying and determining the validity of the claim. When this is not done, the claimant must appeal to the legislature, who of course have the power at any time (and that, whether a suit has been brought or not) to dispose of any part of the public lands, and to direct the Executive to issue the proper evidence of title.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

TO WHOM LAND SCRIP OUGHT TO BE DELIVERED.

Land scrip issued pursuant to the act of the 30th of May, 1830, for the relief of certain officers and soldiers of the Virginia line and navy, must be made out in the names of the persons *prima facie* entitled to it.

If there be equitable assignees of the whole or any part of the scrip which may be issued, and they shall claim the same in hostility to the parties originally entitled, the scrip, if delivered at all, ought to be delivered to the parties originally entitled, their heirs, devisees, or other agent or agents, as contradistinguished from persons claiming interests, as assignees or otherwise, by contract.

To whom Land Scrip ought to be Delivered.

But where the department sees that the just claims of other persons will be liable to be defeated by such delivery of the scrip, it may lawfully suspend the actual delivery until claimants can have time to apply to a court of equity for an injunction; and, if it be procured, to retain the scrip until the rights of the parties can be judicially determined.

ATTORNEY GENERAL'S OFFICE,
April 23, 1836.

SIR: In your letter of the 30th ultimo, after alluding to the circumstances which led to the general employment of attorneys in fact by persons having claims under the act of the 30th of May, 1830, for the relief of certain officers and soldiers of the Virginia line and navy, and of the continental army during the revolutionary war, and informing me that, where the character of the attorney is unexceptionable, it has been the inviolable practice to deliver to him the scrip, when prepared, that he might settle his agency with his principal, leaving it to other tribunals to scrutinize, when necessary, the merits of disputed contracts, you state the following case: "Recently, a case is presented where a first attorney, having established the services of a captain, and proved the identity of his heirs, obtained for them a land warrant, and filed it in the proper office; after which, those heirs executed another power of attorney, and the substitute of that attorney has demanded the scrip prepared in the case, denying the correctness of the practice that has prevailed, and appealing from the decision of the Commissioner of the General Land Office as erroneous." With a view of disposing of this case, and of deciding as to the accuracy of the practice objected to, you request my opinion on the following point: "Whether a contract with heirs, by which an attorney undertakes to establish their right to the bounty of the government, for a specified portion of what he may get, vests such an interest in the attorney that his authority cannot be abrogated without cause, and as ought to be recognised and enforced here."

The first section of the act of the 30th of May, 1830, treats the land warrants previously granted as assignable; but the proviso to the fourth section enacts "that all certificates or scrip to be issued in virtue of any warrant hereafter to be granted shall be issued to the party originally entitled thereto, or his heir or heirs, devisee or devisees, as the case may be."

To whom Land Scrip ought to be Delivered.

It appears, from the papers in the case on which your question arises, that the land warrants which are now the subject of dispute were all granted to the heirs of Captain Joseph Mitchell, after the 30th of May, 1830. Your question must, herefore, be decided by this law—by its provisions, if they meet the point in controversy; by its spirit, if it be not expressly provided for.

So much, at least, is certain: the scrip to be issued in this case must be made out in the names of the heirs or devisees of Captain Mitchell, the party originally entitled. They are also the persons to whom, or to whose order, it is *prima facie* to be delivered.

But, although it is plain that land warrants granted after the 30th of May, 1830, cannot be assigned in such manner as to pass the *legal* title to the assignee, and to authorize the making out of the scrip in his name, yet I am of opinion that third persons may, by purchase and by other means, acquire an equitable interest in such warrants, and in the scrip to be issued thereon; in other words, there may be a valid *equitable* assignment of an interest in the subject. The case put in your question is one of this nature. I perceive no legal objection to a contract with heirs, by which an attorney undertakes to establish their right to the bounty of the government, for a specified portion of what may be recovered, provided it be fairly made. Agencies of this sort grow out of the very nature and circumstances of these cases; and, when fairly made and faithfully executed, they are, no doubt, highly beneficial to the parties intended to be provided for by the act of Congress. In every such instance, the attorney or agent must be regarded as having a vested equitable interest in the land warrants, and in the scrip to be issued thereon, which cannot be abrogated by the party with whom he has contracted, and which the appropriate courts of equity will, no doubt, protect and enforce.

To a certain extent, equitable interests of this nature may and ought to be recognised and protected in your department.

Where the existence and extent of such interests are not disputed by the party originally entitled, the scrip, though made out in the name of such party, may be delivered to the equitable

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assignee. Where the party originally entitled is not before the department, except as represented by persons claiming by equitable assignments from him, I think the department may look into their respective claims, not with a view of adjudicating thereon, (for it has no judicial power in the premises,) but for the purpose of ascertaining whether the claims, or either of them, are of such presumptive validity and fairness as to make it discreet and just to deliver the scrip, or any part thereof, to either or both the contending parties.

Your question, however, looks to an entirely different case: it supposes a contest between the equitable assignee and the party originally entitled, his heirs and devisees; and when you ask whether the interest of the former ought to be recognised and enforced *here*, I understand you as inquiring whether so much of the scrip as may be required to satisfy that interest ought to be delivered to him notwithstanding the objections of the other party.

This question will be satisfactorily answered by a proper regard to the meaning and effect of the word *issued* in the provisions above quoted. What, then, are we to understand by that word, as used in the statute? Does it merely mean that the certificates or scrip shall be made out or filled up in the name of the party originally entitled? and if it be so made out and filled up, may it yet be *delivered*, without his consent, and notwithstanding his remonstrances, to a party claiming under a contract some interest therein? or does it also require its actual delivery to the party originally entitled?

The word itself is of equivocal import. In common parlance, and in its legal use, it sometimes means the making out and sending forth of a writ, order, address, or other document, without including the idea of the delivery thereof to any person in particular. At other times, as when we say that a writ was issued to the sheriff, or an order issued by the commanding officer to one of his inferiors, we usually mean, not only that the writ or order was sent forth, but that it actually reached the party to whom it was directed. The word itself being thus ambiguous, we must recur to the design and spirit of the provision; or, as the old common lawyers technically expressed it, we must look at the old law, the mischief and

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the remedy, and give the word such an interpretation as will most effectually suppress the mischief and advance the remedy.

By the old law, as recognised in the first section, these land warrants were assignable; and when an assignment had been made, the certificates or scrip were accordingly to be made out in the name of the assignee, and, as matter of course, were also to be delivered to him.

The mischief of this state of things was, that the party originally entitled was sometimes induced to execute an assignment of his interest, upon an inadequate consideration, or perhaps without any consideration whatever.

The remedy proposed by Congress was to render the title of the party originally entitled inalienable as between the government and himself, so that the legal title should, at all times, remain in him; leaving all persons who might, under contracts with him or otherwise, have equitable claims thereon, to look to his own honor and good faith, or to the aid of the courts, for the satisfaction of those claims.

It is obvious that if the scrip be delivered to a person claiming as an assignee, or otherwise in hostility to the party originally entitled, the latter will, in some respects, be subjected to the very mischief which the proviso was intended to suppress. The restricted interpretation of the word *issued* is therefore to be avoided; and, for the like reason, we must give to that word the most comprehensive definition of which it is susceptible. In other words: the scrip, if delivered at all, must be delivered to the party originally entitled, his heirs, devisees, or other agent, as contradistinguished from all persons claiming an interest, as assignee or otherwise, by contract with such party.

Whenever, therefore, the party originally entitled, or his representatives, and an attorney or other persons claiming an interest by contract in the warrants, and in the scrip to be issued thereon, are both before the department, and each demands the scrip, I am of opinion that, if it be issued from the department, it must, according to the true spirit and meaning of the act of Congress, be delivered to the former. But I think, also, that in all cases where the department sees that the just claims of other persons will be liable to be defeated by such

 Pre-emptions in Missouri.

delivery of the scrip, it may lawfully suspend the actual delivery until the claimant can have time to apply to a court of equity for an injunction. If he make out such a case as to procure an injunction, it will be proper in itself, and conformable to the usages of the department in analogous cases, to retain the scrip until the rights of the parties can be judicially determined, and then to deliver it to such person as the court may direct.

I find, among the papers before me, some allusion to my opinion in the case of Triplett. It is proper to observe, in respect to that opinion, that my attention was not called to the effect of the proviso above considered; nor was any doubt suggested, in the case as stated to me, in respect to the power and duty of the department to take notice of the interest of Triplett, under the contract with Rice. It was assumed by the department, that, had not Triplett been indebted to the government, the scrip for his share must have been delivered to him; and the question referred to me was, whether it could be retained for the government debt. I held that this could be done; and, on the principles of this opinion, I should still come to the same result. If the proviso applied to the case, still it was obvious that Triplett had an equitable interest in the scrip; and that was enough to justify the United States in withholding the share to which he was equitably entitled, until his debt to them should be fully satisfied.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY,
Secretary of the Treasury.

 PRE-EMPTIONS IN MISSOURI.

In cases of doubt, patents may be suspended until the question shall have been determined by a competent tribunal.

There is reason to doubt whether a pre-emption to an accumulation of land in the Mississippi can be allowed to exist.

ATTORNEY GENERAL'S OFFICE,
April 23, 1836.

SIR: I have had the honor to receive your letter of the 13th instant, enclosing various documents from the General Land

The Issue, of Scrip to be Suspended in Certain Cases.

Office, concerning a case under the pre-emption laws, on which my opinion is requested.

It appears from the papers referred to me, that a person who has been suffered to erect a dwelling on a small island or sand-bar opposite the lower part of the city of St. Louis, in the State of Missouri, has recently preferred to the land office for the district including that city, a claim to a pre-emption right under the law of 1830, and the acts amending and reviving the same; which claim has been allowed by the register and receiver, and a certificate of purchase issued to him and assigned. This location is objected to by sundry inhabitants of the city of St. Louis, on various grounds, which are set forth at length in a communication to the senators and representatives in Congress, which is among the papers before me. I deem it unnecessary to enter at large into an examination of the numerous points suggested in the communication. In my letter of the 21st instant, I had occasion to express my opinion as to the power of the Commissioner of the General Land Office to suspend the execution of letters patent until the direction of Congress or the decision of a competent tribunal shall have been obtained; and I will only add, that, in my opinion, there is great reason to doubt whether a pre-emption could be legally allowed in the present case, even if the sand-bar or island itself could, under any circumstances, be the subject of a grant to individuals by the government of the United States.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

THE ISSUE OF SCRIP TO BE SUSPENDED IN CERTAIN CASES.

The Treasury Department may suspend the issuing of all or any portion of the scrip claimed on a warrant issued for a greater number of acres than may appear to be due, until the true amount can be ascertained.

ATTORNEY GENERAL'S OFFICE,

April 28, 1836.

SIR: In answer to the question proposed to me in your communication of the 15th ultimo, I have the honor to state that,

Powers of Registers of Land Districts.

in my opinion, it is competent for the Treasury Department to suspend the issuing of all or any portion of the scrip claimed on a warrant issued for a greater number of acres than may appear from the documents in the possession of the department to be due from the State of Virginia, until the truth of the case and the precise amount of the claim can be satisfactorily ascertained. It may, however, be proper to suggest, that the amount which the department may admit to be due ought to be issued without delay; and that as the party holding the warrants is presumptively entitled, and as he cannot institute judicial proceedings against the government, some appropriate legal steps should be instituted by the United States in respect to the amount withheld for the purpose of determining the validity of the claim.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER. .

To the Hon. LEVI WOODBURY,
Secretary of the Treasury.

POWERS OF REGISTERS OF LAND DISTRICTS.

Under the act of the 19th February, 1833, registers of land districts are made judges of the validity of purchases made under the first section thereof; and the Treasury Department has no power to revise or reverse their decisions.

ATTORNEY GENERAL'S OFFICE,
April 30, 1836.

SIR: In answer to the questions proposed to me in your letter of the 8th instant, I have the honor to state that, in my opinion, your department has not the legal power to revise and reverse the decision of the register of the land district, as to the validity of the purchases alleged to have been made under the first section of the act of the 19th February, 1833. The proviso to that section requires that "the register of the land district in which the lands lie shall be *satisfied* of the validity of the purchase." The register being thus made the judge, and no authority being conferred on the department to revise the decision, the case comes within the principles stated in my opinion of the 21st instant, as to the authority of the department to review the decisions of the registers and receivers under the pre emp-

Commencement of Pay of a Reinstated Captain.

tion laws, and to suspend the execution and delivery of patents until the conflicting claims of the parties shall have been judicially determined.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY,
Secretary of the Treasury.

COMMENCEMENT OF PAY OF A REINSTATED CAPTAIN.

A captain stricken from the rolls of the army, and afterwards reinstated by and with the advice of the Senate, cannot claim pay after reinstatement only from the date of his acceptance of the new commission.

ATTORNEY GENERAL'S OFFICE,
May 3, 1836.

SIR: It appears, from the documents enclosed in your communication of the 28th ultimo, that a captain who had been stricken from the rolls of the army was, by general orders of the 22d of April last, reinstated in the army, and by the President, by and with the advice and consent of the Senate, restored to his former rank and regiment as captain in the 7th infantry, to rank as such from the 4th of October, 1825. The Second Comptroller being doubtful as to the time when the pay in this case is to commence, you ask my opinion on the question "whether Captain Bonneville is entitled to pay from the date at which he was dropped from the rolls of the army, or from the date of his confirmation by the Senate."

I am of opinion the pay must commence in this case, as in ordinary cases of original appointment—that is, from the *acceptance* of the office. Legally, pay is only demandable for the period during which the person claiming it is actually in office. If there are any peculiar circumstances in this case which give the restored officer a claim on the justice of the nation for pay whilst stricken from the roll, it is to be presumed that Congress will allow it. At any rate, his only remedy is by application to that body.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Pre-emption to Lands Ceded by the Quapaw Treaty.

GRANTS UNDER SUPPLEMENT TO CHOCTAW TREATY.

Allen Yates and wife are each entitled to two sections of land under the second clause of the supplement to the treaty of Dancing Rabbit creek.

ATTORNEY GENERAL'S OFFICE,
May 3, 1836.

SIR: In answer to the question submitted in your letter of the 29th ultimo, I have the honor to state that, in my opinion, Allen Yates and wife are *each* entitled to two sections of land, under the second clause of the supplement to the treaty of Dancing Rabbit creek. This is the grammatical construction of the terms used; and there is no legal impediment to the granting of land to the wife, separate from her husband. Moreover, the eighteenth article of the main treaty expressly declares that, whenever a well-founded doubt shall arise, the treaty shall be construed most favorably to the Choctaws. This benign rule of interpretation must be considered as extending to the supplement. To depart from the natural sense of the words, to the prejudice of the Indians, on mere speculative doubts, would, in my judgment, be very inconsistent with this rule.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEWIS CASS,
Secretary of War.

PRE-EMPTION TO LANDS CEDED BY THE QUAPAW TREATY.

The lands ceded by the Quapaw treaty of August, 1818, are not subject to pre-emption under the act of April 12, 1814.

The Indian title not having been extinguished, they could not have been settled prior to the date of that law, consistently with the claim of the Quapaws.

ATTORNEY GENERAL'S OFFICE,
May 3, 1836.

SIR: In answer to the question proposed in the communication of the Commissioner of the General Land Office, enclosed to me in your letter of the 29th ultimo, I have the honor to state that, in my opinion, none of the lands ceded by the Quapaw treaty of the 24th of August, 1818, are, or ever have been,

Right to Grants of Reservees in the Choctaw Treaty.

subject to pre-emption claims, under the 5th section of the act of the 12th April, 1814.

It seems to me very clear that this section applies only to lands which, prior to the date of the law, had been settled and cultivated consistently with the rightful claims of others. The lands described in the Quapaw treaty are excluded by this test; they could not have been so settled and cultivated prior to the date of that law, because the Indian title had not then been extinguished. The treaty of 1818 is a solemn recognition of that title, which neither the United States nor any one claiming under them are at liberty to dispute; and, so long as it existed, all settlements made on these lands were in contravention of the rightful claims of other persons—that is to say, of the Quapaw Indians.

I am, &c.,

B. F. BUTLER.

TO THE SECRETARY OF THE TREASURY.

RIGHT TO GRANTS OF RESERVEES IN THE CHOCTAW TREATY.

In the event of the death of reservees, under the Choctaw treaty, before the expiration of the five years' residence upon the land, required as a condition precedent to a grant and fee-simple, the interest is not defeated, but goes to those persons who, by the State laws, succeed to the inheritable interest of individual Indians.

ATTORNEY GENERAL'S OFFICE,

May 3, 1836.

SIR: The case stated in the letter of the honorable Mr. Lyon, enclosed in your communication of the 28th ultimo, is as follows:

“A person entitled to a reservation of land under the 14th article of the treaty of 1830, with the Choctaws, after giving the requisite notice of his intention to remain in the country ceded and become a citizen, and after having his name, with the number and age of his children, registered by the agent, died before the expiration of the five years from the ratification of the treaty, during which he was required to reside upon his land before a grant in fee-simple could issue. In the case referred to, the widow has continued the residence for the five years.”

Sale of Military Sites under Act of March 3, 1819.

Mr. Lyon now inquires whether the grant in fee-simple provided by the treaty will issue to the widow, who became the head of the family by the death of the husband? It is insisted by the person at whose instance this inquiry is made, that "the reservation secured by the 14th article of the treaty is to the reservee, in the character of representative of his family; and that, by his death, the widow was substituted as the surviving head of the family to his rights, and entitled to the patent."

I cannot assent to this argument. The person who at the ratification of the treaty was the head of the family, and who elected to remain in the ceded country, and to become a citizen of the State, acquired an equitable interest in the section promised to be granted by the treaty. This interest was liable to be defeated by his voluntary omission to reside in the ceded country for the five years required by the treaty; but as the act of God injures no one, it was not extinguished by his death. In the mean time, like all other interest in lands of an inheritable nature, it was subject to the operation of the State laws, and passed on his death to those persons who, by the laws of the State, succeeded to the inheritable interest of individual Indians, subject to the State laws.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

SALE OF MILITARY SITES UNDER ACT OF MARCH 3, 1819.

The act of March 3, 1819, extends only to such military sites as belonged to the United States at its date; and such sites, when they have, or whenever they may become useless for military purposes, may be sold under said act, whether situated in a State or Territory.

The rule as to the extent of territory which may be sold, is laid down by the Supreme Court in 9 Peters, 761, 762.

ATTORNEY GENERAL'S OFFICE,

May 6, 1836.

SIR: In the communication of the Commissioner of the General Land Office, enclosed in your letter of the 23d ultimo, your attention is called to the act of the 3d March, 1819, entitled "An act authorizing the sale of certain military sites;"

Sale of Military Sites under Act of March 3, 1819.

and inquiry is made whether it applies to Forts Armstrong and Dearborn—the former on Rock island, in the Mississippi river, and the latter at Chicago; and if so, to what extent? These questions you have referred to this office for my opinion thereon.

The first clause of the act referred to authorizes the Secretary of War, under the direction of the President of the United States, “to cause to be sold such military sites *belonging* to the United States as may have been found or become useless for military purposes.” The second clause, after authorizing the Secretary, on payment of the purchase-money, to execute conveyances, provides that “the jurisdiction which had been specially ceded for military purposes to the United States by a State, over such site or sites, shall thereafter cease.” In construing this law, we are met by several questions:

1. Does it extend to military sites not belonging to the United States on the 3d March, 1819, the date thereof?
2. Does it extend to military sites which were not useless at that time, but which have *since*, or which may *hereafter*, become useless?
3. Does it extend to sites not within a *State*, and in respect to which there has not been a cession of jurisdiction by such State?

My opinion on these several points is as follows:

1. I think the law does not extend to any sites except such as belonged, *at its date*, to the United States. This is the grammatical effect of the present participle “*belonging*,” and there is nothing in the context to call for a more liberal interpretation.

2. Military sites belonging to the United States on the 3d March, 1819, may be sold, under this law, whenever they may become useless for military purposes. The contingency is so expressed as to embrace *future* cases, as well as those which had already occurred; and such, I understand, has been the practical construction of the law.

3. I think it does so extend. The last clause may well be considered as intended to apply to those cases in which the sites were situated within a State, but not as necessarily implying that all were so situated.

I am therefore of opinion that the act of the 3d March, 1819,

• Sale of Military Sites under Act of March 3, 1819.

will apply to Forts Armstrong and Dearborn, (provided they were military sites, and belonged to the United States on the 3d March, 1819,) whenever they shall have become useless for military purposes. I know of no better rule for determining the *extent of territory* which may be sold under this law, than that laid down by the Supreme Court of the United States, in the recent case of "*Mitchell and others vs. the United States.*" (9 Peters, 761, 762.)

In that case a land claim founded on Indian and Spanish grants, for a very extensive tract of land, was confirmed by the Supreme Court, with the exception of the fortress of St. Mark's (situated at the junction of the rivers St. Mark's and Wakulla,) and the territory directly and immediately adjacent and appurtenant thereto, which were reserved for the use of the United States. There was no evidence in the record by which the limits of the excepted territory could be designated; and the court itself was therefore obliged to give the rule. It was decreed that the territory to be excepted should be that which had been ceded by the Indians to the Spanish government for the purpose of the fort, if the boundaries of the cession could be ascertained; if the same could not be ascertained, then the adjacent lands, which were considered and held by the government, or the commandant of the post, as annexed to the fortress, for military purposes; if no proof thereof could be obtained, then so much land as, according to military usage, was generally attached to forts in Florida and the adjacent colonies; and if no such usage could be proved, then all the territory between the two rivers, from the middle of the river St. Mark's, below the junction with the Wakulla, to points three miles distant up both rivers. The three miles were probably selected, because generally considered the extreme distance to which a cannon shot can be thrown. As I have not such facts before me as to enable me to apply these principles to this case, I shall content myself with simply stating them, as above, for the information of the Commissioner.

I have the honor to be, your obedient servant,

B. F. BUTLER.

The Hon. LEVI WOODBURY,

Secretary of the Treasury.

Validity of a New Madrid Grant.

VALIDITY OF A NEW MADRID GRANT.

The terms employed in the patent to Raphael Lesieur are not so vague as to render the patent void for uncertainty. In construing public grants issued in great numbers by the officers of the government, and in accordance with a certain formulary deliberately adopted by those officers, the courts may resort to contemporaneous documents on file in the proper department, for the purpose of ascertaining the intent of the grantors.

ATTORNEY GENERAL'S OFFICE,

May 7, 1836.

SIR: I have had the honor to receive your letter of yesterday, in which you enclose certain communications and papers from the Commissioner of the General Land Office, in relation to the form of a patent recently issued from that office, under the act of the 17th of February, 1815, "for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by the earthquake;" and in respect to which you propose for my opinion the following question: "Are the terms employed in the enclosed patent, viz: 'unto the said Raphael Lesieur, or to his legal representatives, and to his or their heirs and assigns forever,' so vague and indefinite as to render the patent void for uncertainty? In other words, are the terms employed sufficiently precise to convey the title, and indicate the legal grantee?"

It is a general rule, in the construction of conveyances, that they are to take effect according to the intent of the parties, if that intent can be ascertained from the language used, and be consistent with the rules of law; and it is only when the words used are so vague and uncertain that the intent cannot possibly be ascertained, that the deed will be held void for uncertainty.

In this case, I am inclined to think, that without resorting to the explanations given by the Commissioner, the courts would hold it reasonably clear that it was the intent of the United States to grant the premises in question to Raphael Lesieur and his heirs, *if he was then alive*; and if not then alive, to the legal representatives of the said Raphael Lesieur and their heirs. In construing public grants issued in great numbers by the

Validity of a New Madrid Grant.

officers of the government, and in accordance with a certain formulary deliberately adopted by those officers, I think the courts may, with propriety, resort to contemporaneous documents on file in the proper department, for the purpose of ascertaining the intent of the grantors. If that be done in the present case, there will be no difficulty in ascertaining that the deed was intended to take effect in the manner above suggested. Assuming, then, that the grant is to be so understood, and the case will stand on precisely the same ground as if the patent, after reciting the facts, had granted the premises described therein "to Raphael Lesieur and his heirs, provided the said Raphael Lesieur be now living; but if the said Raphael Lesieur shall have died prior to the execution of these presents, then to the present legal representatives of the said Raphael Lesieur and their heirs."

Would such a grant have been valid and effectual to pass the estate according to the intent? I think it would; and if I had any doubts on the subject, I should be unwilling, with my present knowledge of the laws of Missouri, and especially after the high authority referred to by the Commissioner, and the usage which has so long obtained, to put them forth.

I will, however, take the liberty of adding a further suggestion. It is stated in one of the papers referred to me, that Raphael Lesieur, the party originally entitled in this case, is yet living; and it is therefore claimed that the patent should be directly to him and his heirs, without the addition of the other words. Though I think his title will be the same if he receive the patent in its present form, as if it had been to him alone; yet I can see no particular necessity for the alternative form, when the party originally entitled is alive and capable of taking the estate. This form was first adopted to meet those cases in which the party originally entitled had died; and where that event has not occurred, it would seem to be proper that the patent should be made out to the grantee named in the certificate, without any alternative words.

I am, &c.,

B. F. BUTLER.

TO the SECRETARY OF THE TREASURY.

Location of Choctaw Reserves.

LOCATION OF CHOCTAW RESERVES.

The grant of the reservation is the essence of this provision of the treaty, and the direction as to the manner in which the same shall be located ought not to be so construed as to defeat the grant.

ATTORNEY GENERAL'S OFFICE,

May 9, 1836.

SIR: I have the honor to acknowledge the receipt of your communication of the 7th instant, enclosing papers relative to the location of a reservation for D. W. Wall, under the Choctaw treaty of 1830, and inquiring whether, in my opinion, that location can be confirmed.

It appears, from the letter of Colonel Martin, the locating agent, that the location in this case had been conditionally made by him of a sixteenth section, subject to the final decision of your department. This course was adopted, because the agent had doubts as to the rights of a reservee, under the treaty, to locate on a sixteenth section. This doubt is met by my opinion of the 31st of March last, in which it was held that these sections are subject to the claims of reservees under the treaty.

From the letter of Mr. Lyon, also enclosed to me, it would seem that another question has arisen in this case.

The supplement to the Choctaw treaty grants to D. W. Wall, and to several other persons, all specially named, one section of land each, "to be located in entire sections, to include their present residence and improvement, with the exception of Molly Nail and Susan Colbert, who are authorized to locate theirs on any unimproved unoccupied land." D. W. Wall, in point of fact, had no residence and improvement of his own, being at the time a minor, and residing with his father. Under these circumstances, I understand it is doubted whether the grant to him has not entirely failed. In the case of George W. Hawkins, arising under this treaty, I had occasion to examine a question somewhat similar in point of facts, and identical in the principle by which it was decided. I then held that the essence of the treaty provision on which the question arises consists in the *grant* of the reservation; and that the direction as to the manner in which the reservation is to be located, though important in itself, and proper to be observed so far as

 Location of Choctaw Reserves.

circumstances would permit, ought not to be so construed as to defeat the grant. Referring to that opinion, under date of the 19th March, 1834, for a fuller exposition of the subject, I have only to add that, in my opinion, the grant has not failed, and that no valid objection is stated in the documents before me to the confirmation of the location.

I am, sir, very respectfully, your obedient servant,
B. F. BUTLER.

HON. LEWIS CASS,
Secretary of War.

 LOCATION OF CHOCTAW RESERVES.

Locations of sections, or parts of sections, should be made by taking whole, half, or quarter sections, as the case may be, without breaking up the legal divisions or disturbing sectional lines.

In this case, the reservee is entitled to the half section on which his improvement is located, and the whole of that chosen for the balance.

ATTORNEY GENERAL'S OFFICE,
 May 10, 1836.

SIR: I have received and considered the case of Noah Wall, as stated in the papers enclosed in your communication of yesterday.

By the supplement to the Choctaw treaty, he is allowed a reservation of a section and a half of land, to include his then present residence and improvement, which were entirely within the south half of fractional section 35. Before any lands were sold in this neighborhood, the representative of Wall applied to the locating agent to locate this reservation on the south half of section 35, and the whole of section 2; which was provisionally done. But the agent, being of opinion that a different location might be made, afterwards sold section 2, and located Wall's reservation on fractional section 35, and on *three quarter sections* in section 36. The claimant objected to this change of location; and, when section 2 was sold, gave notice to the purchaser that it was claimed as a part of Noah Wall's reservation. The locating agent states that, should it be decided that Wall was entitled to the whole of section 2 and the south half of 35, his report of the location can be changed in conformity with such decision.

Risk of Supplies for the Army.

According to the principles stated in opinions heretofore given in this office, locations of sections, and of half or quarter sections, are to be made by taking whole sections, or half or quarter sections, as the case may be, without breaking up the legal divisions or disturbing sectional lines; and when the reservation is to include the improvement of the reservee, the location is to be so made as to give to the reservee, *as a whole section*, the particular section in which his improvement, or the greater part of it, lies; whilst the part section, if he be entitled to any, is to be taken from some adjoining tract. This latter rule cannot be carried out in the present case, because section 35, in which the improvements are situated, is a fractional section of about — acres; and the last location made by the agent, though it takes the whole of section 35, will not give Wall one entire section and an entire half section, but a fractional section and three quarter sections. The first location will, however, give him one entire section, viz: section 2; and a complete half section, viz: the south half of 35; adjoining each other, and including all his improvements: thus answering precisely the words of the treaty, and conforming to the spirit of former decisions. For these reasons, I am of opinion this was the location to which Wall was entitled.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEWIS CASS, *Secretary of War*.

RISK OF SUPPLIES FOR THE ARMY.

The risk of supplies purchased for the army follows the title.

The title of a quantity of pork contracted for by the proper officer, prepared and designated by the vendors, and an order given upon the packers for it, is in the United States; and, if it be then destroyed, the loss must fall upon the government.

ATTORNEY GENERAL'S OFFICE,

May 12, 1836.

SIR: I have had the honor to receive your letter, with the documents enclosed, relative to the claim of Messrs. Hubbard & Co.

Pay of Non-Commissioned Officers whilst acting as Clerks.

According to our law, the risk of goods purchased follows the title; and, consequently, if the title in the pork purchased by Lieutenant Drum, of Messrs. Hubbard & Co., had become vested in the United States prior to its destruction by fire, the government ought to bear the loss. The only point in the case is as to the delivery. It seems, by the concurring statements of both parties, that the agreement was complete, and that the pork was prepared and designated by the vendors; that on the morning of the 7th of October, Lieutenant Drum's sergeant, by his direction, called on the vendors, and received from them an order for the pork on the packers in whose possession it then was; that this order was duly delivered; and that the night after, but before the order had been presented, the pork was destroyed by fire. From the time when the order was received, the property was under the control of the purchaser; and his omission to take it into his actual custody can make no difference. The delivery of the order was, therefore, in law, a sufficient delivery of the pork. The title was transferred to the United States, for whose benefit the contract was made; and they are bound to pay the price stipulated in the agreement.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PAY OF NON-COMMISSIONED OFFICERS WHILST ACTING AS CLERKS.

A quartermaster sergeant acting as a clerk in the office of the quartermaster of the marine corps is entitled to the additional compensation of fifteen cents per day allowed by the act of March 2, 1819, and paid to the sergeant acting as clerk in the office of the Quartermaster General of the army.

ATTORNEY GENERAL'S OFFICE,

May 13, 1836.

SIR: I have had the honor to receive your letter of the 17th of March last relative to the claim of Quartermaster Sergeant Devlin to the additional compensation of fifteen cents per day allowed by the act of the 2d of March, 1819, "to regulate the pay of the army when employed on fatigue duty."

Pay of Non-Commissioned Officers whilst acting as Clerks.

After referring me to his statement, and other documents enclosed in your communication, you ask my opinion on the question, "Whether Quartermaster Sergeant Devlin, acting as a clerk in the office of the quartermaster of the marine corps, be entitled to the additional compensation of fifteen cents per day allowed by the act of 2d March, 1819, and paid to the sergeant acting as clerk in the office of the Quartermaster General of the army?"

The act of the 11th of July, 1798, treats the marine corps as a part of the army; and the 2d section expressly provides that, when serving on shore, the staff officers (including the quartermaster sergeant) shall be entitled to the same extra pay and emoluments which are allowed by law to officers acting in the same capacities in the army. The late act of the 30th of June, 1834, "for the better regulation of the corps," continues to non-commissioned officers, musicians, and privates, the same pay and allowances as they then received.

In the case of Sergeant Fleury, of the army, I gave it as my opinion that the continuous service of a non-commissioned officer of the army proper, as a clerk in one of the bureaus of the War Department, was to be deemed "constant labor," within the legal interpretation of the act of the 2d of March, 1819, and in accordance with the practical construction which that act has received in the Quartermaster's Department, and some other branches of the service. If this opinion was well founded, it will necessarily follow that a non-commissioned officer of the marine corps, performing the like duties, must *prima facie* be entitled to the like allowances.

I perceive, however, that Sergeant Devlin has laid his claim before Congress at their present session, and that the Committee on Naval Affairs of the House of Representatives have reported against it; and, in the report, have dissented from the opinion in the case of Sergeant Fleury, above referred to, in respect to which they observe: "they consider it at variance with the letter and spirit of the law, and feel no disposition to give it their sanction, by extending its benefits to the petitioner." Had it appeared from the report that the precise question submitted to me in the case of Sergeant Fleury had been considered by the committee, the dissent so strongly expressed

Pay of Non-Commissioned Officers whilst acting as Clerks.

by such high authority would certainly have shaken my confidence in my construction of the law. But I think it very clear, from their report, either that my opinion was not before them, and was erroneously stated, or that they did not correctly apprehend the true character of the question referred to me, and the effect of my decision. The report states that Sergeant Devlin was first allowed, for his extra services as clerk, fifteen cents per day; and that, at subsequent periods, without any change of duties, his extra pay has been increased to \$354 per annum; but that, not satisfied with this increase of pay, he now requests an additional allowance of fifteen cents per day, under the act of the 2d of March, 1819, from the commencement of his services as clerk. This request the committee deem an extraordinary one; and they remark, that "the only reason offered for it is, that the Attorney General has decided that sergeants of the army acting as clerks, and receiving extra pay as clerks, were also entitled to the extra pay provided by the act above quoted." The question submitted by the Secretary of War, in Sergeant Fleury's case, was in the following words: "Is a sergeant of the army, employed as an assistant clerk in one of the bureaus of the War Department, entitled to the additional compensation of fifteen cents per day, allowed by the act of the 2d of March, 1819?" It will be seen that it does not include any suggestion whatever that the sergeant was in the receipt of extra pay as clerk; nor does it inquire whether, in addition to such extra pay, he would also be entitled to the fifteen cents per day given by the act of 1819; nor is it intimated in the opinion that a person so circumstanced would also be entitled to the fifteen cents per day allowed by the act. Nor is that point even now presented to me by the terms of your question. But, to prevent further misapprehension, I will add, that I have now, for the first time, considered the question whether a non commissioned officer, performing constant labor within the meaning of the act of 1819, and receiving therefor extra pay by order of the head of the department, is also entitled to the fifteen cents per day given by that act; and that I do not see how this circumstance can vary his legal right to the pay and allowance given by law; although I do see that, if the extra pay was really intended to

Liability of Midshipmen to Arrest.

be in lieu of the fifteen cents per day, it would be inequitable in the party to claim the latter; and that, if claimed and received, it might be the duty of the department so to reduce the extra pay as to effectuate the intent with which the increase was ordered. There is also much reason to doubt whether extra pay, in addition to the fifteen cents, can be given by the head of the department in any case which is provided for by the act of 1819. My impression is, that persons belonging to the army, who come within the act, are entitled to their regular pay and allowances, and to the special allowances given by the act, and to nothing more, unless they perform extra duties beyond the "constant labor" therein provided for; in which case, extra pay beyond the fifteen cents per day may no doubt be given.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

LIABILITY OF MIDSHIPMEN TO ARREST.

Midshipmen are not exempt from arrest; the proper construction of the act of the 11th of July, 1798, for establishing and organizing the marine corps, failing to include them in the exemptions made.

ATTORNEY GENERAL'S OFFICE,

May 16, 1836.

SIR: In answer to the question proposed in your communication of the 14th instant, I have the honor to inform you that, in my opinion, midshipmen are not exempted from arrest, by the true construction of the fifth section of the act of the 11th of July, 1798, "for the establishing and organizing a marine corps." It is true that they are officers, and that they are not commissioned; but then they are not "non-commissioned officers," within the usual and technical signification of that phrase; nor are they "enlisted into the service." It being, therefore, to say the least, exceedingly doubtful whether Congress intended to include them in the exemption from arrest, it would, in my opinion, be improper to effect that result by a latitudinary construction of the law. If public policy requires

Piracy upon the High Seas.

the extension of the privilege to these officers, it is not to be doubted that Congress will so direct, in explicit terms, whenever their attention may be called to it; and in the mean time it is safest to wait for such a direction.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

PIRACY UPON THE HIGH SEAS.

A Texian armed schooner cannot be treated as a pirate under the act of 30th April, 1790, for capturing an American merchantman, on the alleged ground that she was laden with provisions, stores, and munitions of war for the use of the army of Mexico, with the government of which Texas, at the time, was in a state of revolt and civil war.

ATTORNEY GENERAL'S OFFICE,

May 17, 1836.

SIR: From an examination of the various documents this day referred to me in the case of the Texian armed schooner *Invincible*, I gather the following facts:

The American brig *Pocket* sailed from New Orleans, in which port she had been duly registered and cleared, in April last, for Brassos of St. Iago, a port within the limits of Texas. When approaching the termination of her voyage, she was captured by the armed schooner *Invincible*, sailing under the flag of the recently constituted republic of Texas, on the alleged ground that she was laden with provisions, stores, and munitions of war, destined for the use of the Mexican army under the command of General Santa Anna, and carried into Galveston bay, where the cargo was landed, and used or held by the Texian authorities, and the vessel released. These facts being made known to Commodore Dallas, the officer commanding the United States naval forces in the West Indies and the Gulf of Mexico, with a strong appeal from the insurers and other persons interested in the protection of our commerce in those seas, that officer deemed it his duty to regard the *Invincible* as a *pirate*, and to treat her as such. He therefore promptly despatched the United States ship *Warren*, Master Commandant Taylor, with orders to cruise for the *Invincible*, and, in the event of his falling in with her, to capture her, and send

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her to New Orleans to be delivered up for adjudication. Pursuant to these orders, the *Invincible* was captured on the 29th ultimo, with the principal part of the crew. Both vessel and men were sent to New Orleans, and delivered to the civil authority, to be proceeded against on the charge of piracy. Under these circumstances, my opinion is required upon the question, whether the charge of piracy can be sustained?

In answer to this question, I have the honor to state that, in my opinion, the capture of the American ship *Pocket* can in no view of it be deemed an act of piracy, unless it should appear that the principal actors in the capture were citizens of the United States. The 9th section of the crimes act of the 30th of April, 1790, declares, "that if any citizen shall commit any piracy or robbery, or any act of hostility, against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign Prince or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and, on being thereof convicted, shall suffer death." This provision is yet in force; and should it be found that any of those who participated in the capture of the *Pocket* are American citizens, the flag and commission of the government of Texas would be insufficient to protect them from the charge of piracy. It is, however, not suggested, in the papers before me, that any citizens of the United States were engaged in the capture; and if it be assumed that the actors in it were aliens, it must then, I think, be admitted that the capture, however unjustifiable in other respects, can never be regarded as piracy. Where a civil war breaks out in a foreign nation, and part of such nation erect a distinct and separate government, and the United States, though they do not acknowledge the independence of the new government, do yet recognise the existence of a civil war, our courts have uniformly regarded each party as a belligerent nation, in regard to acts done *jure belli*. Such may be unlawful, when measured by the laws of nations or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States; but the parties concerned

Relief of the Sufferers by Fire in New York.

are not treated as pirates. It is true, that where persons acting under a commission from one of the belligerents make a capture, ostensibly in the right of war, but really with the design of robbery, they will be held guilty of piracy. In the present case, there is not the least reason to believe that the capture was made with any such criminal intent. It would seem to be an infraction of the treaty made in 1831 between the United States and the United Mexican States, (of which Texas was then a constituent part,) and there may be other reasons for doubting its legality as an act done in the right of war; but that it was really done in that character, and no other, is very clear. The existence of a civil war between the people of Texas and the authorities and people of the other Mexican States, was recognised by the President of the United States at an early day in the month of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican government. This recognition has been since repeated by numerous acts of the Executive, several of which had taken place before the capture of the Pocket. On the assumption that the actors were aliens, the case is, therefore, fairly brought within the principle above stated, and the charge of piracy cannot be sustained.

I am, sir, &c., &c.,

B. F. BUTLER.

To the PRESIDENT OF THE UNITED STATES.

RELIEF OF THE SUFFERERS BY FIRE IN NEW YORK.

The persons referred to in the act of 19th March, 1836, for the relief of the sufferers by fire in the city of New York, before its modification by the amendatory act of the 5th of April, who, upon notice given by the collector, made returns of their losses, and tendered new bonds, which were accepted by the collector, are entitled to the full benefit of that act.

But those whose bonds were proffered, but not executed, prior to the passage of the amendatory act, are not entitled to the benefit of the original law.

ATTORNEY GENERAL'S OFFICE,

June 17, 1836.

SIR: I have had the honor to receive your letter of the 24th ultimo, proposing for my opinion several questions arising un-

Relief of the Sufferers by Fire in New York.

der the act of the 19th of March last, "for the relief of the sufferers by fire in the city of New York," and the act of the 5th of April last, amendatory thereof; to each of which questions I shall now proceed to reply.

1. Are persons of the description referred to in the first-mentioned act entitled to the full benefits, before its modification by the amendatory act of the 5th of April, who, upon notice given by the collector, made returns of their losses and tendered new bonds, for the extension of credit provided for in the act, which bonds were *accepted* by the collector prior to the passage of the last-mentioned act?

This question, in my judgment, must be answered in the affirmative. Until the passage of the amendatory act, the collector was fully authorized to extend the benefits of the original law to all persons coming within the terms of that law and complying with its provisions; and I regard his acceptance of the new bond as a virtual cancelment of the former security, because he is expressly authorized and *directed* to give up or cancel all such prior bonds, upon the receipt of the new bonds described in the law. His omission to do this formal act cannot affect the rights or obligations of the parties. From the moment, therefore, when the new bond was received, the law was substantially complied with; the obligors by whom the new bond was executed became responsible to the United States, and the obligors in the former bond were entitled to be discharged.

2. You propose the like question in reference to cases where returns of losses were made, and the execution of new bonds *proffered*, but *not* executed, prior to the passage of the amendatory act, owing to the collector being desirous of having them prepared according to official forms.

In these cases, I am of opinion that the parties are *not* entitled to the benefits proffered by the original law. I regard all the advantages held out by that law in the light of a mere gratuity, in respect to which no vested right can be acquired except by the actual acceptance of a new bond during the period for which the law was in force. Until such acceptance, I think it was in the power of Congress to recall the proffered bounty; and this they have done, so far as regards all bonds

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made *after* the fire, by the act of 5th of April. In all cases not substantially consummated before the enactment of the amendatory law, that law must govern, precisely as if its provisions had been incorporated in the first act.

3. In the case of bonds given between the happening of the fire and the passage of the act of the 19th of March, which fell due previous to the passage of the amendatory act of the 5th of April, but not paid until subsequently thereto, can the money paid on such bonds be refunded, and new bonds taken with the extended credit for the amount?

This question must also, for the reasons first stated, be answered in the negative.

I am, sir, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PAY OF OFFICERS OF THE NAVY.

Promoted officers of the navy, whose commissions fix dates of rank anterior to the dates of the commissions, are entitled to the increased pay from the date to which their appointments were carried back, provided they were intermediately in the performance of duties compatible with the grade to which they were elevated by their promotions.

ATTORNEY GENERAL'S OFFICE,

June 18, 1835.

SIR: I have had the honor to receive your letter of the 19th ultimo, in which you ask my opinion on the following question: "Are the officers of the navy entitled, under the act of the 3d of March, 1835, which regulates the pay of the navy, to increased pay from the date of their commissions, or from the date from which they take rank?"

It appears, from the Auditor's letter enclosed in your communication, that previous to the act of the 3d of March, 1835, it was the practice in his office to allow the officers who were promoted increased pay from the date from which they took rank, and not from the date of their commissions, although they were intermediately in the performance only of the duties of a lower grade; and that, since that act, in a few cases in which promotions have taken place, increased pay has been

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allowed in conformity with the ancient usage. In consequence, however, of my having remarked, in an opinion recently transmitted from this office to the War Department, that "legally, pay is only demandable for the period during which the party claiming it is actually in office," the Auditor infers "that the Attorney General does not consider that an officer is entitled to the pay of any grade, unless actually promoted to it, and in the performance of the appropriate duties;" and he has, therefore, reported the above question for my opinion.

The observations above quoted from the opinion alluded to by the Auditor, especially when taken in connexion with the point then before me, is not necessarily decisive of the legality of the usage which has, it seems, hitherto obtained in your department. The persons embraced in that usage have "been actually in office;" the government has received the benefit of their services, and is bound to pay them therefor; and the only question is, as to the *amount* of compensation to which they are entitled. On looking at the commission of Lieutenant Poor, (whose case, as I understand, has given rise to the above question,) I perceive that, although it is dated the 15th of April, 1836, it expressly appoints him a lieutenant in the navy from the 22d of December, 1835; and this, I presume, is the general form. I have, therefore, no hesitation in saying that, in cases of this sort, the officer is justly entitled to the increased pay from the date to which the appointment is thus carried back, provided he was intermediately in the performance of duties which, though capable of being performed by the *lower* grade, were at the same time compatible with the higher grade. In other words, and applying the principle distinctly to the case of Lieutenant Poor: if that gentleman, from the 22d of December to the 15th of April, was in the performance of duties which were only appropriate to the grade of passed midshipman, I cannot think it either just or lawful to allow him the pay of a lieutenant; but if the duties performed by him were such as might have been lawfully assigned to a lieutenant, then I think it both just and legal to allow him the pay of that grade.

I am, sir, &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Pre-emptions under Act of May 29, 1830.

PRE-EMPTIONS UNDER ACT OF MAY 29, 1830.

Legal evidence from competent sources, (excluding the oaths of claimants and all interested parties,) is what is intended by the word "proof" contained in the act of the 29th May, 1830.

The Commissioner may prescribe the mode and kind of proof—how and by whom it should be taken; but cannot prescribe anything as proof which is not such in fact, nor any rule as to its weight and force.

Where it is intended to admit the oath of an interested party, it is generally provided for in express terms.

Unsupported affidavits of settlers are not admissible as proof under the act.

Competent proof is required; yet the Commissioner cannot properly require competent proof to be corroborated.

An entry allowed by the register and receiver upon the affidavit of the interested party and only corroborated by facts within their knowledge, is only erroneous and voidable, not void as against the United States.

Settlers or occupants, within the meaning of the law, are those who reside personally on the public land in question, or who occupy and use it. Settlements and occupancy cannot be effected by proxy.

ATTORNEY GENERAL'S OFFICE,

June 21, 1836.

SIR: In your letter of the 16th ultimo, you enclosed a communication from the Commissioner of the General Land Office, presenting several questions growing out of the conflicting claims of Messrs. Adams and Lapsley under the pre-emption law of the 29th of May, 1830, and the acts amending and reviving the same, on which you request my opinion, and to which I shall now proceed to reply:

"1. Is the affidavit of the interested claimant, unsupported by '*corroborative testimony*' from any other source, or by any other evidence, legal and competent proof to establish a right of pre-emption, when received as satisfactory by the register and receiver?"

In order to come to a correct decision of this question, we must first inquire whether the particular regulation of the 10th of June, 1830, to which it refers, and by which it was prescribed that "the fact of cultivation in 1829, and possession on the 29th of May, 1830, must be established by the affidavit of the occupant, and by such *corroborative testimony* as may be entirely satisfactory," was valid and obligatory on the registers and receivers under the act of 1830. The third section of this act provides "that, prior to any entries being made under

the privileges given by this act, *proof* of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office for that purpose." This section sets out with requiring, as an indispensable condition to the right of entry, that *proof* of settlement or improvement shall be made; and though it afterwards empowers the Commissioner of the General Land Office to prescribe rules for the purpose of such proof, it is yet very evident that this latter clause cannot authorize the General Land Office either to dispense with the preceding requirement, or to superadd to it any further one. The Commissioner is merely to prescribe rules, conformably to which the proof is to be made; the proof itself is indispensable. In other words, he may determine by regulations what kind of proof shall be received, and in what manner it shall be made: that is to say, whether by producing witnesses for personal examination before the register and receiver, or by depositions or affidavits: if in the former mode, who shall administer the oath, and by whom the witnesses shall be examined; if in the latter, by whom, and under what formalities, such depositions or affidavits are to be taken, &c. But he has no power to authorize the officers to receive anything as proof, which is not *proof* within the true meaning of that word; and as they alone are to judge of its sufficiency, he has no power to make any regulation concerning the weight or force of the evidence that may be offered.

The word "proof," when used in a statute relating to proceedings in courts of justice, or conferring powers of a judicial nature on any officer or board, is always interpreted to mean that sort of conviction which is produced by legal evidence coming from a competent source. As a general rule, it cannot be allowed to include the oath of the claimant or other interested party; because, by the general rules of evidence, persons so circumstanced are incompetent witnesses. In some of the American States, the oath of an interested party is received, in connexion with his books of account, to establish a book debt; and it is usual to allow a party to testify to the loss of a deed or other document, for the purpose of letting in secondary evi-

Pre-emption under Act of May 29, 1830.

dence of its contents. But I am not aware that, in any part of the Union, a party claiming an interest in lands is entitled to offer himself, and to be examined as a witness in his own behalf, for the purpose of establishing such an interest. It is true that provision is frequently made in statutes for receiving affidavits of interested parties, to prove matters out of court; but, whenever the legislature design to authorize the reception of such evidence, they are careful to provide for it in express terms; so that these exceptions only serve to illustrate and confirm the general rule. In the present case, there is an entire absence of any such provision. If, therefore, I had been called upon for an opinion in regard to the validity of the above-mentioned regulation, prior to its adoption, I should, with my present impressions on the subject, have advised the department that the oath of the claimant could in no case be received as evidence under the statute.

For the reasons above stated, I should also have said that, when legal evidence is once offered to the register and receiver, it is their exclusive province to judge of its weight and force; and that the Commissioner had no authority to prescribe, *as a fixed rule*, that competent evidence shall be *corroborated* by further testimony. Evidence received from a competent source, and credited by the tribunal to which it is offered, becomes, if not rebutted, *proof*, in the legal acceptance of the term. If, therefore, the oath of the party could be received as evidence in these cases, I should think the officers should be left to judge for themselves, in each particular case, whether such an oath be entitled to credit without corroborative testimony, or whether additional evidence should be required in its support.

I am aware that, in a new country, there may be difficulty in producing disinterested witnesses to prove the settlement and cultivation required by the pre-emption laws; and that in some cases, perhaps, if the oath of the interested party be rejected, he may not be able to find other evidence. This consideration, though it might well be addressed to Congress when framing a pre-emption law, does not, in my opinion, authorize the other departments of the government to relax the general rules of evidence, and to introduce an exception so serious in itself, and so liable to abuse, as the one under review.

I am thus not only inclined to answer the question proposed by the Commissioner in the *negative*, but to go further. I think the affidavit of the interested claimant, even when supported by other testimony, is insufficient to establish a pre-emption right; unless, indeed, the further evidence of itself amounts to full proof, in which it ought to be regarded as principal testimony, and not as merely corroborative. But when I consider how many cases have probably been decided under the rule in question, I am happy to be able to add, that the erroneous construction which I suppose to have been given to the law in this respect does not render the proceedings *void*, but only *erroneous and voidable*. In all cases, therefore, in which the entry has been allowed, and the certificate granted on the affidavit of the claimant, but in which the proceedings are otherwise regular, the certificate must be held good as against all parties, except the United States; and as against them also, until it be vacated by regular judicial authority.

“2. Can a claimant who caused the cultivation of an acre and a half of public land in 1833, on a particular quarter section, and was in possession thereof on the 19th of June, 1834, but who was engaged during the former years in cultivating other land not of the United States, and was boarding in the neighborhood, be entitled to pre-emption of the quarter section he so caused to be cultivated?”

The first section of the act of the 19th of June, 1834, provides “that every *settler or occupant* of the public lands, *prior to the passage of this act*, who is now in possession, and *cultivated* any part thereof in the year *one thousand eight hundred and thirty three*, shall be entitled to all the benefits and privileges provided by the act entitled ‘An act to grant pre-emption rights to settlers on the public lands,’ approved May 29, 1830. And the said act is hereby revived, and shall continue in force two years from the passage of this act, and no longer.”

To entitle any person claiming under this section to the benefits granted by the law which it revives, he must prove—

1. That he was, prior to the 19th June, 1834, a “settler or occupant” of some part of the public lands.

2. That in the year 1833 he *cultivated* some part thereof; and

3. That on the 19th of June, 1834, he was in *possession* thereof.

There is some difference in the meaning of the words "settler" and "occupant." It cannot be said with much propriety that one is an "occupant of the public lands," unless he actually and *personally resides on, or personally occupies and uses such lands*; but I suppose that a person who places a family or an individual on the public lands, and thus *causes* a settlement to be made, may, in an enlarged sense of the term, properly enough be called a *settler* of the public lands, notwithstanding he may not *personally* occupy the same. But I do not believe that Congress intended, in the provision before me, to recognise this distinction.

The title of the act of 1830 is as follows: "An act to grant pre-emption rights to settlers *on* the public lands," (not *of* the public lands;) and though the word "*occupant*" is not used, yet the preposition "*on*" necessarily restricts the word "*settler*" to one who *personally occupies* and resides *on, or personally occupies* and uses the public lands, and excludes all idea of a settlement by proxy. The first enacting clause of the act of 1830, like that of 1834, commences with the phrase, "every *settler or occupant* of the public lands;" but it is evident from the whole context, as well as from the general spirit of all our pre-emption laws, that this phrase was deemed equivalent, and only equivalent, to the words used in the title.

The same remark applies to the section above quoted from the act of 1834; and I am, therefore, of opinion that no person can be deemed a "settler" or "occupant," within the meaning of that section, unless he shows that he had personally settled on the public lands prior to the 19th of June, 1834. According to the terms of the present question, the claimant seems never to have been, in the sense just explained, a "*settler*" or "*occupant* of the public lands;" and I must, therefore, answer the question in the negative.

"3. Are not the instructions of the 10th of June, 1830, continued in force, without being repeated, since the passage of the act of the 19th of June, 1834?"

In reply to this question, I have the honor to state that, so far as those instructions were agreeable to the original law, I

think they were continued in force by the revival of that law.

In the communication of the Commissioner of the General Land Office, enclosed to me in your letter of the 24th ultimo, several additional questions are proposed, as also arising in the case of Adams and Lapsley, which I have also considered, and shall now answer.

"1. When a new land district is established, embracing lands that previously formed a part of another, can such lands be legally sold at the old office after the passage of the act of division? and, if so, at what period does the jurisdiction of the officers of the old district over such land cease and determine?"

It was decided by the Supreme Court of the United States, in the case of *Matthews vs. Zane's lessee*, (5 Cranch, 92,) that the erection of the Zanesville land district, which was partly formed out of the Marietta district, suspended, in respect to lands included in the new district, the power of sale before vested in the Marietta district; and from the reporter's marginal note, it would seem that he considered the decision as determining that this suspension took effect from the date of the act establishing the Zanesville district, (the 3d of March, 1803,) although the register and receiver for that district were not actually appointed until the 26th of March, 1804.

As a general rule, and except where special provisions are otherwise made in the law erecting the new district, I think the principle of this decision correct; and I must therefore adopt it in reply to the present question, with the following qualification: I do not understand the Supreme Court as deciding that the officers of the Marietta district might not have proceeded to consummate any sale substantially made before the date of the law erecting the Zanesville district. And where an entry and sale of a specific portion of the public lands have been substantially made in pursuance of law, the formal consummation of which is deferred for the want of necessary plats, or for any other cause, I should not think that the erection of a new district, with boundaries including such lands, could prevent the officers of the old district from completing the proceedings.

"2. Do the terms of the act erecting the land office at Dan-

Pre-emptions under Act of May 29, 1830.

ville contain anything so essentially or materially different from that erecting the Zanesville district, as to render the decision in the case of *Matthews vs. Zane* inapplicable to the former?"

In answer to this question, I have the honor to state that I have carefully examined the act of February 19th, 1831, by which the Danville district was carved out of the Vandalia district; and that I cannot find in it anything materially different from the act of 1803, which was the subject of decision in the case referred to.

"3. Are there peculiarities in the recited circumstances of the Adams and Lapsley case that will take it out of a rule to be established by the decision of the two last questions?"

I think there are no such peculiarities in the case in question. If the claim of Adams had been made, and his proofs filed and adjudged satisfactory by the register and receiver, and the pre-emption right had been admitted by them prior to the 19th February, 1831; and if the complete execution of the sale had been prevented by the want of necessary plats, and by that cause alone, I should then have considered the sale as substantially made; and, in accordance with the above suggestion, I should have thought that payment might be received, and the certificate executed, whenever the plats came in. In the present case, however, the proofs of Adams were not filed until the 27th of May, 1831, more than three months after the erection of the Danville district; and there is nothing, therefore, in his case to take it out of the established rule. It is true that, by applying that rule to pre-emption cases thus circumstanced, we shall materially circumscribe the operation of the pre-emption law of 1830, in respect to settlers residing within what was afterwards made the Danville district; for, as the Danville officers were not sworn in until the 18th of June, 1831, and as the year limited in the pre-emption law expired on the 29th May, 1831, those settlers after the 19th February, 1831, had no office to which they could make application for the establishment of their claims. But this cannot alter the legal effect of the new statute. The benefits and privileges held out by the pre-emption act of 1830 must be regarded in the light of a mere gratuity; and so far as respects settlers whose entries were not actually made, Congress had the

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power, at pleasure, to modify, restrict, or even wholly revoke, their proffered bounty.

The Commissioner remarks in his letter, that "the answers to the questions now propounded will be important in their consequences, as cases similar or analogous to the one last mentioned are said to be so numerous, that if the proceedings have been wrong, there has prevailed, in a considerable degree; a *communis error* in such respect; and the consequences of annulling all sales under like circumstances would probably be more mischievous than salutary." The only observation I can make on this suggestion is, that neither the Executive nor the judiciary can dispense with the positive provisions of the existing laws, and that Congress alone can remedy the mischiefs which the Commissioner apprehends. I think it right to add, that this seems to be a very clear case for the enactment of a confirmatory law, giving validity to all entries and sales of the public lands in pre-emption and other cases, made in the old districts at any time prior to the opening of the land office in the new district, where the proceedings in other respects have been fair and regular.

I am, &c.,

B. F. BUTLER.

TO the SECRETARY OF THE TREASURY.

PRE-EMPTIONS.

Pre-emption floats mislaid on lands subject to another right of preference, may be raised and properly relocated at any time prior to the public sale of the lands, including the tract on which the original right accrued, but not afterward.

ATTORNEY GENERAL'S OFFICE,

June 24, 1836.

SIR: In answer to the questions proposed in the letter of the Commissioner of the General Land Office, enclosed to me in your communication of the 26th ultimo, I have the honor to state that, in my opinion, floating pre-emption rights laid upon lands previously entered by other floats, or for any other cause not subject to such entry, may be raised and located elsewhere

Proof of Intention under the Choctaw Treaty.

on any land subject to such entry, at the pleasure of the holder, at any time prior to the day appointed by the President's proclamation for the commencement of the sale of the lands which include the tract on which the right of pre-emption is claimed, but not after that day; and that I perceive no objection to the Commissioner's thus advising the inferior officers.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PROOF OF INTENTION UNDER THE CHOCTAW TREATY.

The Department of War is at liberty to receive, and ought to receive, any credible evidence, documentary or oral, coming from any disinterested source, which may tend to establish the fact that heads of families signified to the agent, within due time, their intention to remain and become citizens of the States.

ATTORNEY GENERAL'S OFFICE,

June 27, 1836.

SIR: In answer to the question presented in the statement of Mr. Lyon, embraced in your letter of the 23d instant, I have the honor to state, that as no particular evidence is required by the treaty itself, nor by any act of Congress, to be produced by persons claiming the benefit of the 14th article of the Choctaw treaty, for the purpose of showing that they actually signified to the agent, within due time, their intention to remain and become citizens of the States, I think the department at liberty to receive, and that it ought to receive, any credible evidence, documentary or oral, coming from any disinterested source, which may tend to establish that fact; and that all Choctaw heads of families who shall prove by any such evidence that they actually and in good faith signified to the proper agent, in due time, their intention to remain, and who have resided the proper time on the land, are entitled to the reservations secured by the treaty, notwithstanding their names may not have been entered by the agent on the list.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEWIS CASS,

Secretary of War.

Rights of Pensioners under Act of May 20, 1836.

RIGHTS OF PENSIONERS UNDER ACT OF MAY 20, 1836.

The act of 20th May, 1836, placed pensioners on precisely the same footing as if the act to prevent defalcations, &c., had never been passed; consequently, all moneys which have been withheld from pensioners under the construction theretofore given to the act to prevent defalcations, ought to be refunded.

ATTORNEY GENERAL'S OFFICE,

June 27, 1836.

SIR: It appears from the communication of the Commissioner of Pensions, enclosed in your letter of the 25th instant, that doubts have arisen as to the meaning of the act of the 20th May, 1836, explanatory of the act entitled "An act to prevent defalcations on the part of the disbursing agents of the government, and for other purposes;" and that my opinion is, therefore, desired on the following questions: "Shall the amount heretofore withheld from a pensioner, under the act of the 25th January, 1828, be refunded? And, if not, at what time shall the explanatory act take effect?"

In answer to these inquiries, I have the honor to state that, in my opinion, the intention of Congress in enacting the explanatory law of the 20th of May, 1836, was to place the claims and rights of pensioners on precisely the same footing as if the act "to prevent defalcations," &c., had never been passed; and, consequently, that all moneys due to pensioners, which have been, and yet are, withheld under the construction heretofore given to that law, and for that reason only, ought to be refunded to them. The explanatory law takes effect from its date; but its operation, in the respect above mentioned, is, in some sense, retrospective.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

HON. LEWIS CASS,
Secretary of War.

Additional Compensation to Captains.

ADDITIONAL COMPENSATION TO CAPTAINS.

The additional compensation of ten dollars per month allowed to captains of the army for their duties and responsibilities in respect to the clothing, arms, and accoutrements of companies, by the act of the 2d of March, 1827, may be claimed by all captains of volunteers or militia, embraced in the act of the 19th of March, 1836, who performed any duty, or were charged with any responsibility, with respect to the clothing, arms, or accoutrements, or with respect to either of these articles, belonging to their companies.

ATTORNEY GENERAL'S OFFICE,
June 27, 1836.

SIR: In answer to the question proposed in the communication of the Paymaster General of the 23d instant, on which you ask my opinion, I have the honor to state, that I think the additional compensation of ten dollars per month allowed to captains of the army for their "duties and responsibilities with respect to the clothing, arms, and accoutrements of the company," by the act of the 2d of March, 1827, may justly be claimed by all captains of volunteers or militia, embraced in the act of the 19th of March, 1836, who performed any duty, or were charged with any responsibility with respect to the clothing, arms, or accoutrements, or with respect to *either* of these articles, belonging to their companies. These duties and responsibilities are all treated by the act of 1827 as worthy of extra compensation; and if, by the regulations of the government, or the nature of the service, the captains of any particular corps are relieved from a part of them, that may be a good reason with Congress for apportioning the allowance; but, as the law now stands, we cannot apportion it. We must either grant all or deny all; and as the officer who is charged with the safekeeping of the arms and accoutrements, or with that of the arms alone, performs as much of this duty as the government thinks proper to assign him, I think him fairly, as well as legally, entitled to the sum allowed by the act of 1827.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Supervision of the General Land Office.

SUPERVISION OF THE GENERAL LAND OFFICE.

The act of the 4th of July, 1836, places the General Land Office under the supervision of the Secretary of the Treasury. If there be doubts of its effect, it is at any rate competent for the President to exercise his control by directing the Secretary of the Treasury to superintend the same, under the usual subordination to the President.

ATTORNEY GENERAL'S OFFICE,

July 4, 1836.

SIR: Pursuant to your direction, I have examined the bill which has just passed the two houses of Congress, for the purpose of answering your question as to the effect of the bill on the connexion now existing between the General Land Office and the Treasury Department. By the first section of the act "for the establishment of a General Land Office in the Department of the Treasury," passed April 25, 1812, it is provided that there shall be established in the Department of the Treasury an office, to be denominated the General Land Office, the chief officer of which shall be called the Commissioner of the General Land Office, whose duty it shall be (under the direction of the head of the department) to superintend, execute, and perform all such acts and things touching or respecting the public lands of the United States, and other lands patented or granted by the United States, as have heretofore been directed by law to be done or performed in the office of the Secretary of State, of the Secretary and Register of the Treasury, and of the Secretary of War, or which shall hereafter, by law, be assigned to the said office. The first section of the bill before me declares that, from and after the passage of the act, "the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States." The bill then proceeds to make various provisions for increasing the force of the office, and for

regulating the transaction of business; and the eleventh section provides that such provisions of the act of the 25th of April, 1812, entitled "An act for the establishment of a General Land Office in the Department of the Treasury," and of all acts amendatory thereof, as are inconsistent with the provisions of this act, be, and the same are hereby, repealed. The form of this repealing clause implies that there are some provisions contained in the former laws which are not inconsistent with the present bill; and, after a careful examination of the subject, I am of opinion that the clause of the act of 1812, which makes the General Land Office a branch of the Treasury Department, and thereby subjects it to the general superintendence of the President, through the head of that department, is one of those provisions which are not inconsistent with the new bill, and which, therefore, are not repealed by the eleventh section. The receipts of the General Land Office are yet connected with the Treasury Department, and, in so far as the management of the public land is a branch of the fiscal concerns of government, it is of course included within the Department of the Treasury; and being thus included therein for these important purposes, it would be against all sound rules of interpretation to consider the other branches of the General Land Office as withdrawn from the Treasury Department by virtue of equivocal and doubtful expressions. Nothing short of a clear and unambiguous provision should be held to work so material a change. I do not find any such provision in this law; and I therefore think that the opinion above expressed is the only legitimate and safe conclusion which can be drawn from the language of the legislature. I adopt this view the more readily, because, if it do not carry into effect the real intention of Congress, it will at any time be in their power to accomplish their purpose by a supplementary act.

To prevent all difficulty, however, in respect to the power of the Secretary of the Treasury to superintend the business of the General Land Office, under the direction and subject to the control of the President, I would suggest the expediency of your authorizing and directing the Secretary of the Treasury, by order in writing, to superintend and direct, in the manner heretofore accustomed, and with the usual subordination

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to the President, the general business of the Land Office. Under the constitution of the United States, and the provisions of the present bill, it would be perfectly competent for the President, even had the law of 1812 been expressly repealed, to give his directions to the Commissioner, through the Secretary of the Treasury; and, from the multifarious duties constantly pressing on the Executive, it is manifestly impossible, as a general rule, that his direction can be given in any other way than through some one of the heads of departments.

I have, &c.,

B. F. BUTLER.

To the PRESIDENT OF THE UNITED STATES.

PRE-EMPTIONS.

Certain lands having been actually entered under the pre-emption laws, pursuant to instructions sent to the register and receiver from the Treasury Department, the case is clearly brought within the terms of the second section of the act of July 2, 1836; and the patent should issue accordingly.

ATTORNEY GENERAL'S OFFICE,

July 6, 1836.

SIR: In answer to the questions proposed in the case of Philo Carpenter, as reported to me by the Commissioner of the General Land Office in his communication of yesterday, I have the honor to state, that, as it appears from the statement of the Commissioner, and the note subjoined, that the land was actually *entered*, under the pre-emption laws, pursuant to instructions sent to the register and receiver from the Treasury Department, the case is clearly brought within the terms of the second section of the act of 2d of July, 1836, "to confirm the sales of public land in certain cases." The patent must, therefore, be issued, provided the proceedings have been in all other respects fair and regular.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

HON. LEVI WOODBURY,

Secretary of the Treasury.

Attesting and Sealing Patents.

ACCOUNTABILITY OF SUPERINTENDENT OF THE CUMBERLAND ROAD.

The superintendent for construction and repair of the Cumberland road may be allowed to disburse funds committed to his care, by turning over the same to officers employed under him; yet he must be held personally accountable at the treasury for the correct disbursement thereof.

ATTORNEY GENERAL'S OFFICE,
July 15, 1836.

SIR: In answer to the question arising on the second section of the act of June 24, 1834, "for the construction and repair of the Cumberland road," and proposed to me in your communication of the 11th instant, I have the honor to state that, in my opinion, the superintendent selected under that section may be allowed to disburse the funds committed to his care, by turning over the same to the various officers employed under him, and directing them to pay the same to persons doing the work. But, though it is not necessary that he should personally pay over the money to the persons doing the work, I think he must be charged with the whole amount placed in his hands, and that he will be personally accountable for the correct disbursement thereof at the treasury.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

ATTESTING AND SEALING PATENTS.

The recorder of the General Land Office only has power to attest and seal patents for public lands, the former law in this respect having been repealed by the act of July 4, 1836.

ATTORNEY GENERAL'S OFFICE,
July 25, 1836.

SIR: In reply to the question proposed to me in your communication of the 22d instant, I have the honor to state that, in my opinion, the duty and power of attesting and sealing patents for public lands belong, under the late act "to reorganize the General Land Office," exclusively to the recorder

Duties and Responsibilities of the Deposit Banks.

of that office. They form so material a part of his functions, as described in section 4, that I consider the provision of the former law, which devolved them on the Commissioner, inconsistent with the new law, and therefore repealed.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

DUTIES AND RESPONSIBILITIES OF THE DEPOSIT BANKS.

The deposit banks are required to pay interest upon any sum which may remain in them to the credit of the Treasurer of the United States over and above three-fourths of their capital, respectively, for the period which may elapse before the Secretary of the Treasury shall find it expedient to transfer it to another bank—whether the same have been used or remained unemployed.

Deposit banks from which a transfer is ordered, are liable for interest until the moneys transferred shall be actually placed to the credit of the Treasurer in those to which the transfers shall be made.

Money held by the agencies of deposit banks must be regarded, in respect to liability for interest, as well as in all other respects, precisely as if no agencies existed, and as if the money were held at its ordinary place of business, and in the ordinary way. Interest should be charged upon the amount which may be held by both the bank and its agencies above one-fourth of the capital stock.

ATTORNEY GENERAL'S OFFICE,

August 1, 1836.

SIR: I have had the honor to receive your letter of the 15th ultimo, in which you ask my opinion on several questions which have arisen on the late deposit law; to which questions I shall now proceed to reply.

1. Is a bank to be required to pay interest upon any sum which may remain in it to the credit of the Treasurer of the United States, over and above three-fourths of its capital, during the period which may elapse before the Secretary of the Treasury shall find it expedient to transfer it to another bank, but which it cannot by the law hold for use or otherwise?

By the 11th section of the act, it is provided "that whenever the amount of public deposits to the credit of the Treasurer of the United States, in any bank, shall, for a whole quarter of a year, exceed the one-fourth part of the amount of the capital

Duties and Responsibilities of the Deposit Banks.

stock of such bank actually paid in, the bank shall allow and pay to the United States, for the use of the excess of the deposits over the one fourth part of the capital, and interest at the rate of two per centum per annum, to be calculated for each quarter, upon the average excess of the quarter." The state of the account between the bank and the Treasurer of the United States, for public money standing to the credit of the latter, is thus made the test, and the sole test, of the liability of the bank to pay interest for the excess of deposits held by it for the requisite period. The statute does not make the obligation to pay interest at all dependent on the question whether or not the bank has used, or might safely have used, the public money; nor does it authorize any discrimination between those sums which may lawfully be suffered to remain with the bank on deposit, and any excess over three-fourths of its capital paid in; on the contrary, it makes the bank liable to the payment of interest, whenever the aggregate of the public moneys held by it to the credit of the Treasurer shall exceed, for a whole quarter, the one-fourth of its capital paid in, whether the same shall have been used by the bank, or shall have been suffered to lie unemployed. It assumes that the money so held by any bank will be used by it; and in stating the liability to pay interest, the word "use" is therefore employed; but not in any such way as to make the actual use a condition precedent to the liability. Strictly speaking, indeed, the banks have no right to use the public money as such; it is only from its being blended with the mass of their funds, that it is subject to be used by them; and they are at all times obliged to keep such an amount of funds on hand as to meet any draft which may be made on them, when required for public service. In legal contemplation, therefore, the excess of public money held by any bank, over three-fourths of its actual capital, though it cannot be permitted to remain with such bank, is yet precisely as much subject to be used by the bank whilst it does remain with it, as any other part of the public deposits; so that, if the question turned on that point, I should still reply to it in the affirmative.

2. Is the bank from which a transfer is ordered to be charged with interest, until the sum directed to be transferred shall ap-

pear to the credit of the Treasurer upon the books of the bank to which the transfer is directed; or is interest suspended while the transfer is *in transitu* from the date of the notice, or the date at which the former bank receives notice to place the amount transferred in the latter bank; or must it be paid till the money is actually placed in the other bank?

Whilst the money ordered to be transferred is actually *in transitu*, it would perhaps be equitable to stop the charge of interest; but, as the law is framed, I do not see that any discretion is allowed. Until the bank from which the money is ordered shall have entitled itself to a credit by having placed it in the other bank, it must remain charged to the former bank; because the duty of making transfers of the public money without cost or risk to the United States, is one of the services agreed to be performed by every deposit bank. And as the fact that money standing in any bank to the credit of the Treasurer of the United States, for the requisite period, and of the requisite amount, is made by the law the sole test of the liability of the bank to be charged with interest, it follows that the charge must continue until the money directed to be transferred shall have been placed to the credit of the Treasurer in the bank to which the transfer is directed.

3. Where the agency of a bank is employed as a depository under the authority of the first section of the act, is interest to be charged upon the amount which may be held, both by the bank and its agency, above one-fourth of the capital stock of the former; or is interest only to be paid upon the sum which each may hold beyond one-fourth part of the amount of the capital of the bank, treating each as separately representing the stock, &c.?

By the first section of the act, the Secretary is authorized to make "arrangements with a bank or banks in some other State, Territory, or district; to establish an agency or agencies in the States, Territories, or districts destitute of banks, as banks of deposit; and to receive through such agencies such deposits of the public money as may be directed to be made at the points designated, and to make such disbursements as the public service may require at those points." The arrangement thus authorized is to be made, not with the agency, but with

 Transfers of Money to the Mint.

the bank; and it is the bank which, through the agency, is to receive the money and make the disbursements. The section further provides, that "the duties and liabilities of every bank thus establishing an agency shall be the same in respect to its agency, as are the duties and liabilities of deposit banks generally, under the provisions of this act." Under these explicit enactments, it seems to me very clear that any money held by the agency of a deposit bank must be regarded, in respect to its liability to interest, as well as in all other respects, precisely as if no agency existed, and as if the money were held by the bank at its ordinary place of business, and in the ordinary way. In my opinion, therefore, interest is to be charged upon the amount which may be held, both by the bank and its agency, above one-fourth of the capital stock of the former.

I am, sir, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

 TRANSFERS OF MONEY TO THE MINT.

Transfers of money to the mint, by order of the President, for the purpose of coinage, in execution of the proviso to the twelfth section of the act to regulate the deposits of public money, should be made by drafts in the same manner as from one deposit bank to another, remaining to the debit of the Treasurer as money in the treasury.

ATTORNEY GENERAL'S OFFICE,

August 2, 1836.

SIR: I have had the honor to receive your letter of the 22d ultimo, requesting my opinion on the question, whether, in transferring money to the mint, by order of the President, for the purpose of coining, in execution of the proviso to the twelfth section of the act "to regulate the deposits of public money," passed June 23, 1836, such money is to be drawn from the treasury by warrant, crediting the Treasurer, and debiting the director of the mint, with the amount; or to be transferred by drafts in the same manner as from one deposit bank to another, remaining the whole time at the mint to the debit of the Treasurer, as money actually in the treasury?

Transfers of Money to the Mint.

The communication of the acting Treasurer of the United States to yourself explains in so lucid a manner the difference between the two modes, as to supersede the necessity of any remarks on that point, in this place. The argument of that officer in favor of the mode first suggested in the above question, is also very clear and forcible; and if the question in debate were one of mere practical convenience, I should certainly be very much inclined to yield to his suggestions. But as the matter involves some points of great moment, I have given to it a very deliberate consideration; and, as its result, I have the honor to inform you that, in my opinion, the operation referred to in your question must be performed by transfer drafts, and not by warrant.

I concur in the proposition, that the organic law of September 2, 1789, which makes it the duty of the Treasurer "to receive and *keep* the moneys of the United States, and to *disburse* the same upon *warrants* drawn by the Secretary of the Treasury, and countersigned by the Comptroller," is not to be repealed by implication, nor by casual and indefinite terms; and this, for a higher reason than that stated by the acting Treasurer. The constitution provides that "no money shall be drawn from the treasury, but in consequence of *appropriations* made by law;" and that "a regular statement and account of the receipts and *expenditures* of all public money shall be published from time to time." The act of 1789, organizing the Treasury Department, so far as it requires all public money to be kept in the treasury until it is duly drawn out by *warrant* for the purpose of being disbursed, and so far as it forbids the paying of money out of the treasury except on warrant, is therefore in exact accordance with the constitution, and consequently irrepealable.

It is, in my opinion, a mistake to suppose that the proviso on which the present question has arisen authorizes any disbursement or expenditure of the public money, or was designed to draw any part of it out of the treasury. The title of the act describes truly its general design and effect: it is an act "to *regulate* the *deposits* of the public money;" not to *appropriate* any part of them, except for the additional clerk-hire required to carry the act into effect, as provided for in the 15th section.

Transfers of Money to the Mint.

The proviso to section 12 conforms, in this respect, to the other leading provisions of the law; it merely substitutes the mints and branch mints in lieu of the banks as places of deposit. It not only contains no express words of appropriation, but, from the nature of the case, no such words could, with propriety, be used; because the placing of public money in the mint for the purpose of coining, is not an *appropriation* within the meaning of the constitution. The same clause which requires an *appropriation* by law, uses the word *expenditure* as a synonymous term; thus showing that, in the view of the framers of the constitution, no *appropriation* can be made of the money in the treasury, except for the purpose of an *expenditure*. But the money in question is not to be expended; it is only to be transferred from the hands of one depositary to those of another; it is yet to exist in specie, and as the property of the government. It is true that it may be somewhat diminished by wastage, and by the expenses of coining; but the like diminution by wastage, or by accidental loss, may happen to other money in the treasury. Such a contingency, however it may prejudice the Treasurer, if no allowance be made to him, cannot affect the legal character of the money. As no money can be taken out of the treasury by warrant, except in pursuance of an appropriation for the purpose of being expended, and as the money in question is not to be expended,—it follows that it cannot be taken out of the treasury, and that the warrant used for that purpose cannot be employed in the present case.

I have chosen to place my opinion on the ground above stated, rather than on the particular language of the proviso, (although the word “transfer” is not only accordant with the preceding view, but quite inconsistent with the opposite construction,) because there is some reason for the remark, that the terms “transfer” and “warrant” are not used in the law, in the distinctive sense understood at the treasury.

In regard to the inconsistencies supposed to be involved in the use of the transfer draft, it would be sufficient to observe, that even the certainty of their occurring would not justify us in giving a construction to the provision repugnant to the language employed in it, to the title of the law, and to its general

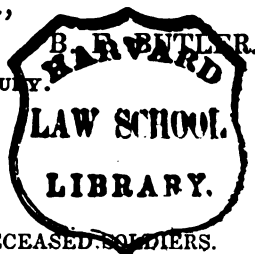
Pensions to Children of Deceased Soldiers.

scope, and repugnant also to the constitution itself. But it may be added, that some of the alleged inconsistencies are founded on the erroneous assumption that the money is to be taken out of the treasury, and that, should all the others actually exist, they can easily be remedied by further legislation. And even without applying to Congress, I cannot doubt that the Treasurer will be entitled to allow a credit to the director of the mint, and to obtain credit for himself with the accounting officers, for all actual wastage, and all necessary expenses involved in the execution of the law.

The letter of the acting Treasurer is herewith returned.

I am, sir, &c., &c.,

To the SECRETARY OF THE TREASURY.



PENSIONS TO CHILDREN OF DECEASED SOLDIERS.

The children of soldiers embraced in the first section of the act of the 4th of July, 1836, who have died, leaving widows and children, and the widow having married again before the passage of the act—**HELD**, that the children are entitled to its benefits within the equity of the law.

ATTORNEY GENERAL'S OFFICE,

August 3, 1836.

SIR: In answer to the question proposed in the communication of the acting Commissioner of Pensions, enclosed in your letter of the 26th ultimo, I have the honor to inform you that, in my opinion, where a soldier embraced in the 1st section of the act of the 4th of July, 1836, has died, leaving a widow and children, and the widow has married before the passage of the act, the children, within the equity of the law, and by a liberal construction of its provisions, are entitled to its benefits.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Accounts and Accounting Officers.

FRACTIONAL SECTIONS TO BE TAKEN FOR QUARTERS.

Fractional quarter sections selected under the special acts of 2d March, 1831, and 4th July, 1832, must each be taken instead of an entire quarter section. Additional selections to make the complement in quantity of ten sections, need a confirmatory act of Congress.

ATTORNEY GENERAL'S OFFICE,
August 8, 1836.

SIR: In reply to the question proposed to me in your letter of the 19th ultimo, I have the honor to inform you that, after mature consideration, I am of opinion that, according to the principles established by the decision of the Treasury Department and of the President, every fractional quarter section selected under the acts of the 4th of July, 1832, and the 2d of March, 1831, by the governor of Arkansas, must be taken and considered as a full quarter section; and that I am not prepared to say that those decisions were not correct. I perceive, therefore, no mode of confirming all the selections made in the present case; but it appears to me that, under the circumstances, there is great reason for asking of Congress a confirmatory act establishing those selections.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

ACCOUNTS AND ACCOUNTING OFFICERS.

Accounts once closed and settled, under the circumstances of the present case, cannot be opened, except on the principles governing courts of equity in opening decrees.

ATTORNEY GENERAL'S OFFICE,
August 8, 1836.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, and, in reply to the questions stated by the Fourth Auditor, to state, that, in my opinion, the decisions of his predecessor and of the Second Comptroller, on the two points mentioned by the Auditor, were entirely correct. An account once closed and settled, under the circumstances

 Confirmations of Sales and Pre-emptions.

stated, would not, I think, be opened by the courts of equity; and, as a general rule, the principles of those courts ought, in my opinion, to be observed in the accounting offices.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

 CONFIRMATIONS OF SALES AND PRE-EMPTIONS.

The first section of the act of 2d July, 1836, confirms sales that are fair and regular in all respects, other than those provided for in the second section; and the same rule applies to the second section.

The Commissioner has to judge of the proof, and may receive further evidence in support of the fairness and regularity of the claim.

ATTORNEY GENERAL'S OFFICE,

August 10, 1836.

SIR: In answer to the questions proposed by the Commissioner of the General Land Office, in the communication enclosed in your letter of the 5th ultimo, I have the honor to state, that to bring any case within the second section of the act "to confirm the sales of public lands in certain cases," passed July 2, 1836, it must appear—

1. That an entry has been made under the pre-emption laws, pursuant to instructions sent to the register and receiver from the Treasury Department; and,

2. That the proceedings have been, in all *other* respects, *fair* and *regular*.

Whether the first of these requisites has occurred, or not, in any particular case, is rather a question as to facts peculiarly within the knowledge of the Treasury Department, than a question of law; and I shall, therefore, express no opinion in respect to it. In regard to the other requisite, viz: that the proceedings shall have been, in all *other* respects, fair and regular, I would observe, that, as the second section is enacted in connexion with a provision curing certain specified irregularities, the irregularities so cured must be deemed tacitly excepted from the second section, and that the same principle must be applied to the *first* section; that is to say, in the case

Specifications of Land paid for at the Treasury.

provided for in the first section the patent should be issued, provided the proceedings have been fair and regular in all particulars other than that provided for and remedied in the second section; and in the case provided for in the *second* section, the patent should be issued, provided the proceedings have been fair and regular in all particulars except that remedied in the *first* section.

The law undoubtedly contemplated a decision by the Commissioner, on the evidence and other matters transmitted to the General Land Office by the register and receiver; but if the Commissioner shall not be satisfied, by the documents so transmitted, that the proceedings have been fair and regular, and this requisite can be made out by the production of further evidence, directed to him, I think such further evidence may lawfully be received for that purpose.

I am, &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

SPECIFICATIONS OF LAND PAID FOR AT THE TREASURY.

Where the purchase money is paid directly to the Treasurer, the specific tract of land must be stated, the same as if applied for at the office of the land district, and the same form must be pursued.

ATTORNEY GENERAL'S OFFICE,

October 24, 1836.

SIR: In your letter of the 4th instant, enclosing a communication addressed to you by the Treasurer of the United States, you request my opinion on the following question submitted by that officer:

“Does the law of 1820 authorize the Treasurer to require such a specification of the land to be purchased, when payment is made to him, as is required by the receiver of public moneys?”

In reply to this question, I have the honor to inform you that, in my opinion, the Treasurer has authority, under the law of 1820, to require the like specification of the land to be purchased, as was required in his office in such cases under

 Payment of Balances of Pensions due Widows at Death.

the former law, and as is now required by the receivers of public moneys. There is nothing in the act of 1820 which indicates an intent to depart, in this respect, from the former usage; on the contrary, the language seems to require that the specific amount of purchase-money should be paid on each tract; and as the usage of the receivers has been in accordance with the former practice, and as the act of 1820 places the receipts of the two officers on precisely the same ground, I see no good reason for allowing payments to be made into the Treasury on any different principle from that which was formerly pursued, and which is yet followed by the receivers.

I have, &c.,

B. F. BUTLER.

HON. LEVI WOODBURY,

Secretary of the Treasury.

PAYMENT OF BALANCES OF PENSIONS DUE WIDOWS AT DEATH.

The children of widows pensioned under the third section of the act of July 4, 1836, who shall have died leaving a balance due them from the government, are entitled to such balance to the exclusion of executors and administrators. Pensions under this act are not liable for the pensioner's debts.

ATTORNEY GENERAL'S OFFICE,

October 24, 1836.

SIR: In answer to the question proposed in the letter of the Commissioner of Pensions, enclosed in yours of the 5th instant, I have the honor to inform you, that, in my opinion, where a widow who may have been pensioned under the 3d section of the act of July 4, 1836, shall die leaving children, such children will be entitled to the balance of the pension due to such widow at the time of her death, to the exclusion of the executor or administrator. This principle is expressly recognised in the 4th section of the act of the 7th of June, 1832, which is *in pari materia* with the 3d section of the act of July last; and, although no express provision is made on the subject in the last law, yet, from the connexion between the two laws, and the close analogy which exists between the two classes of cases, I think the principle of the former law in this respect may well be regarded as pervading the last. The 4th

Pensions to Widows under Act of 1836—When to Commence.

section of the act of July last shows that the pension was not intended to be subject to the party's debts; but that would be the case in regard to the balances due at the death of the widow, if it were payable to the executor or administrator. This furnishes an additional reason for the above construction.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

RATIONS OF AN OFFICER ACTING AS HEAD OF A BUREAU.

The word "compensation" occurring in the law, is synonymous with "pay" or "salary," and does not include rations. The act, therefore, does not include the double rations heretofore allowed by the regulations.

ATTORNEY GENERAL'S OFFICE,

October 24, 1836.

SIR: In answer to the question proposed in the letter of Paymaster Andrews to the Paymaster General, "relative to the effect of the proviso in the 5th section of the act of Congress of the 4th of July last, providing for the 'appointment of additional paymasters, and for other purposes,' upon the allowance of double rations to an officer temporarily acting as the head of a bureau, in the absence of the chief thereof," I have the honor to state that, according to the decisions of this office in analogous cases, the word "*compensation*" is synonymous with "*pay*" or "*salary*;" and, therefore, does not include *rations*. I am accordingly of opinion that the proviso in question ought not to be construed to embrace the allowance of double or extra rations heretofore allowed by the regulations, as stated by the paymaster.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PENSIONS TO WIDOWS UNDER ACT OF 1836—WHEN TO COMMENCE.

The pensions to widows and orphans granted by the first section of the act of the 4th July, 1836, commence from the day when the bill was approved by the President in all cases in which the death of the party serving occurred anterior to that day; in subsequent cases, from the death of the party.

Emoluments of District Paymasters.

The act embraces the cases of widows and orphans whose husbands and fathers might subsequently die, as well as those who did die before its passage.

ATTORNEY GENERAL'S OFFICE,

October 24, 1836.

SIR: In answer to the questions proposed by the Commissioner of Pensions, on the first section of the act of the 4th of July, 1836, granting half-pay to widows and orphans, I have the honor to reply as follows:

1. In my opinion, the pension granted by this section is to commence from the day when the bill was approved and became a law, as to all cases in which the death of the party serving had occurred anterior to that day; and, in all subsequent cases, from the time of the death of such party. Pension laws, drawn in the form used in this law, have usually been regarded in this office as vesting in the widow or children (as the case may be) a legal right to the pension from the day of the death of the husband or parent; but, as this is a new law, it cannot have the effect to give such a right for any time anterior to its passage.

2. As already intimated, I think the first section embraces the cases of widows and orphans whose husbands and fathers may hereafter die in the service, as well as those who had died before the passage of the law.

I am, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

EMOLUMENTS OF DISTRICT PAYMASTERS.

The proviso of the act of the 3d March, 1835, inhibiting the payment of percentage to officers of the army for any service or duty, unless authorized by law, is a permanent provision, and cannot be avoided except by an express enactment: wherefore, a commission cannot now be allowed to Paymaster Kirby on moneys paid out by him to the militia and volunteers serving in Florida.

ATTORNEY GENERAL'S OFFICE,

October 24, 1836.

SIR: I have had the honor to receive your letter of the 3d instant, enclosing a communication from the Paymaster Gen-

Emoluments of District Paymasters.

eral, relative to the application of Paymaster Kirby to be allowed a commission of *one* per cent. on the moneys paid out by him to the militia and volunteers serving in Florida, and asking my opinion as to the power of your department to grant that application.

After the reduction of the army, on the conclusion of the late war, and prior to the act of the 14th of July, 1832, the Secretary of War appears, in several instances, to have exercised the power of making discretionary allowances to paymasters of the army of the United States, for the risks and losses sustained by them in making payments to the militia and volunteers. These allowances were made in the shape of *commissions* on the money paid; and, as I understand, were usually fixed at two and a half per cent. The only ground, as I suppose, on which such a power could have been exercised, was the absence of any legislative provisions making it a part of the regular duty of the army paymasters to make payments to militia and volunteers. But, by the 3d section of the act of the 14th July, 1832, it was provided "that it shall be the duty of the district paymasters of the army of the United States, in addition to the payments required to be made by them to the regular troops, to make payment to all other troops in the service of the United States, whenever required thereto by the President;" and thereby became, and still is, a part of the regular duties of the paymaster to perform these services, whenever directed so to do by authority of the President. The discretionary power before possessed by the department, to make an extra allowance for such services, was also thereby abrogated; and it was doubtless in consequence of this change that the 2d section of the act of the 2d of March, 1833, provided "that the Secretary of War be authorized, at his discretion, out of the moneys appropriated by this or any former act for the payment of militia ordered into the service of the United States according to law, during the last year, to allow and pay to the district paymasters of the army of the United States, employed in making such payments, a commission on the sums respectively paid by them, not exceeding one per centum upon the amounts."

The act of the 14th January, 1836, making appropriations

Emoluments of District Paymasters.

for the suppression of hostilities commenced by the Seminole Indians, provides "that the sum of one hundred and twenty thousand dollars be, and the same hereby is, appropriated, out of any money in the treasury not otherwise appropriated, to pay the expense attending the suppression of hostilities with the Seminole Indians in Florida, to be expended under the direction of the Secretary of War, conformably to the provisions of the act of April 5, 1832, making appropriations for the support of the army." And the same reference is, in effect, made in the subsequent acts. When the act of the 5th of April, 1832, was passed, the discretionary power spoken of above was possessed by the Secretary of War, and was exercised in the settlement of paymasters' accounts under that act, by the allowance of a commission of two and a half per cent. The Paymaster General supposes that the general reference to the act of the 5th of April, 1832, contained in the acts of the last session, includes authority to make the like allowance—that is to say, to the extent of two and a half per cent.; and as he considers even that allowance not too much for the risks and losses of the service, he recommends the granting of Mr. Kirby's application. I think, however, that the intent to confer such a discretionary power, and, of consequence, to prevent the application of the 3d section of the act of the 14th of July, 1832, is not sufficiently apparent, in the general reference alluded to, to enable me to concur in this suggestion. Besides, the proviso of the act of the 3d of March, 1835, "making additional appropriations for the Delaware breakwater, and for certain harbors and removing obstructions in and at the mouths of certain rivers," expressly declares "that no officer of the army shall receive any per cent., or additional pay, extra allowance, or compensation, in any form whatever, on account of the disbursing any public money appropriated by law, during the present session, for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service or duty whatever, unless authorized by law." This has been held in this office to be a general and permanent provision; and it can only be gotten over by a clear and explicit enactment. Whilst I concur in the justice and necessity of some

Explanation of the Deposit Law of June 23, 1836.

provision for the hazards and losses inseparable from the duty performed by Paymaster Kirby, I see no way in which it can be authorized, except by a special provision similar to that inserted in the act of the 2d of March, 1833.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

EXPLANATION OF THE DEPOSITE LAW OF JUNE 23, 1836.

The expression "a whole quarter of a year" means a whole fiscal quarter, as known at the department from its organization.

Banks employed as depositories before the passage of the act of 1836, which have had an amount exceeding one-fourth of their capital during the whole of the fiscal quarter elapsed since the act, are chargeable with interest for the quarter, although their agreements were not executed until a part of the term had expired.

But in order to make them liable for the interest, the deposits must have exceeded one-quarter of the capital for the whole quarter.

ATTORNEY GENERAL'S OFFICE,

October 27, 1836.

SIR: I have had the honor to receive your letter of the 3d instant, asking my opinion on several questions arising on the 11th section of the deposite law of the 23d of June last; to each of which questions I shall now proceed to reply.

1st. In my opinion, the expression "a whole quarter of a year" means a whole *fiscal* quarter, in accordance with the division of a year used in your department from its organization. If it had been intended to designate the period of *three months*, I think some other expression would have been used. The context, also, in my opinion, favors the idea that the Treasury quarter was contemplated by Congress.

2d. I think that where a bank, employed as a depository of the public money before the passage of the act, has had in its custody, during the whole of the fiscal quarter which has entirely elapsed since the act, an amount of public money exceeding one-fourth part of its capital stock actually paid in, such bank is chargeable with interest for the whole fiscal quarter; although it may not have executed the agreement pre-

Construction of Act Continuing Commissioner of Pensions.

scribed by the act until after a part or the whole of the quarter had expired. The agreement, whenever executed, has relation back, so as to subject the bank to the payment of interest, according to the intent of the law and the plain equity of the case.

3d. In order to subject a bank to the payment of interest, the public deposits in it must, "for a whole quarter of a year, exceed the one-fourth part of its capital." To bring the case within this provision, I think the amount of the public deposits must, at all times during the quarter, exceed the one-fourth part of the capital; and, consequently, that if, for a single week, or even a day, the amount be reduced below one fourth of the capital, the bank cannot be charged with interest during the quarter.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

CONSTRUCTION OF ACT CONTINUING COMMISSIONER OF PENSIONS.

Where a future time is expressed in an act of Congress, like "two years from and after the 4th day of March next," the law-makers are to be understood as speaking from the moment when the bill was approved by the President, and became a law.

ATTORNEY GENERAL'S OFFICE,

November 3, 1836.

SIR: The first section of the act "to continue the office of Commissioner of Pensions," approved March 3, 1835, declares "that the office of Commissioner of Pensions shall be, and the same is hereby, continued for the term of two years from and after the 4th day of March next, and no longer." Some doubts are stated to have arisen whether the words "fourth day of March next" are understood to mean the fourth day of the month in which the act passed, or whether they are to be taken in their literal signification—i. e. the fourth day of the March next succeeding. And the question has been duly presented to me for an official opinion.

Pension to Mrs. Perry.

In every case of this sort, the law-makers are to be understood as speaking from the moment when the bill was approved by the President, and from which it commenced and took effect as a law. In this case, "the fourth day of March *next*" means, therefore, the fourth day of the month of March next succeeding to the month of that name in which the bill was approved—*i. e.* the 4th of March, 1836; consequently, the law will continue in force till, and including, the 4th day of March, 1838.

B. F. BUTLER.

To the SECRETARY OF WAR.

PENSION TO MRS. PERRY.

Mrs. Perry is not excluded by the act of 1821 from the benefit of the act of 1817, and her rights vested under it: so that the act first mentioned is to be regarded as a grant to her and her family, over and above her pension under the last-mentioned act.

ATTORNEY GENERAL'S OFFICE,
November 3, 1836.

SIR: I have had the honor to receive your letter of the 17th of September, in relation to the case of Mrs. Perry; and have duly considered the question proposed for my opinion.

It is very possible that the Congress which passed the act of the 2d of March, 1821, may, in point of fact, have been ignorant of the act of the 3d of March, 1817, and of the rights of Mrs. Perry under it. But the legal presumption is directly the reverse; and as there is nothing in the act of 1821 to exclude Mrs. Perry from the benefits of the former law, or to limit her in the enjoyment of the rights vested in her thereby, I do not see upon what principle it can now be done. I am accordingly of opinion that the act of 1821 is to be regarded as a grant to her and her family, over and above her pension under the act of 1817.

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Commutation Money due Volunteers under Act of 1836.

COMMUTATION MONEY DUE VOLUNTEERS UNDER ACT OF 1836.

Every volunteer mustered into service under the act is entitled at once, and in one payment, to receive, in money, a sum equal to the full cost of the clothing of a non-commissioned officer or private, as the case may be, in the regular troops of the United States, without reference to the time for which he may be kept in service.

OFFICE OF THE ATTORNEY GENERAL,

November 3, 1836.

SIR: Pursuant to your directions, I have examined the second section of the act of the 23d of May, 1836, "authorizing the President of the United States to accept the services of volunteers, and to raise an additional regiment of dragoons, or mounted riflemen," for the purpose of answering the question arising thereon, in respect to the amount of commutation money for clothing to which the volunteers therein mentioned are entitled by virtue of that section, and the time when it is payable. After the most deliberate and mature reflection on the subject, I am of opinion that every volunteer mustered into service under the act is entitled, at once and in one payment, to receive in money a sum equal to the full cost of the clothing of a non-commissioned officer or private (as the case may be) in the regular troops of the United States; and this without reference to the time for which he may be kept in service. This is the natural sense of the words employed, and I do not perceive by what authority any more limited construction can be given to them.

B. F. BUTLER.

To the PRESIDENT OF THE UNITED STATES.

COMMUTATION MONEY DUE VOLUNTEERS UNDER ACT OF 1836.

Volunteers, whether for six or twelve months, are entitled to the cost of all those articles which are required to clothe a soldier in the army of the United States on his entrance into service; for a year if he shall be enlisted for a year—for six months if that be his term.

OFFICE OF THE ATTORNEY GENERAL,

November 8, 1836.

SIR: The Paymaster General has called my attention to several questions of importance, growing out of the opinion given

Commutation Money due Volunteers under Act of 1836.

by me under date of the 3d instant, in relation to the provision concerning the money to be paid in lieu of clothing, under the act of the 23d of May, 1836.

He inquires whether the allowance is to be affected by the *time* for which the service is offered and accepted;—that is to say, is the volunteer for *six* months to receive as much as the volunteer for *twelve* months; and if not, what proportion? He also suggests that the annual allowance for clothing in the army varies materially, according to the period of service; and inquires whether the *average* of the three years ought not to be taken in this case.

In answer to these questions, I have the honor to state that, in my opinion, the volunteer, whether for six or twelve months, is entitled to the cost of all those articles which are required to clothe a soldier in the army of the United States on his entrance into the service. This will comprise a complete suit, with a change of such articles as are required to be changed; and a renewal of such articles as are usually worn out during the term for which the volunteer offers. I think, also, that the allowance ought to be equal to the full cost of all those articles which are usually furnished to soldiers during the *first year of their service*; for although, where the service is for three years, (as is now the case in the regular army,) a smaller allowance is sufficient for the second year, and a still smaller for the third, in consequence, in several instances, of a single article (such as a cap and great-coat) lasting through the three years, and, in others, of two articles (such as a coat furnished the first year, and another furnished the second) lasting through the three; yet where the service is for a single year, there can be no room for any such operation; and, therefore, from the necessity of the case, the cost of the clothing intended in the act of May the 23d, 1836, where the service offered for is twelve months, is plainly the cost of all those articles which are required by existing regulations to be furnished to the soldiers in the regular service. This, I understand, is forty-two dollars and eighty-three cents; and I am accordingly of opinion that every volunteer offering and accepted for twelve months is entitled, immediately on his being mustered into service, to the

Commutation Money due Volunteers under Act of 1836.

sum of forty-two dollars and eighty three cents in lieu of clothing.

When the volunteer offers and is accepted for only six months, it may seem at first blush that he is only entitled to the *one half* of the sum (whatever it is) to which a person volunteering for *twelve* months would be entitled. But a moment's reflection will be sufficient to refute such an opinion. The law makes no difference whatever between the two classes; the provision on the subject is a single one, and in one and the same words. Every volunteer—no matter whether for six or twelve months—is entitled, “when called into service, to receive, in money, a sum equal to the cost of the clothing for a non-commissioned officer or private (as the case may be) in the regular troops of the United States.” And when it is considered that, if the volunteer for six months did not clothe himself, he would require as complete a suit as a volunteer for twelve months, and that the allowance in money was intended to take the place of the actual issuing of clothing, a good reason will be perceived for placing both cases on the same ground. Besides, it is impossible to divide a garment without destroying its value; and the volunteer can no more be required to take half the cost of a coat or cap, than he could be, were he to be furnished with the article, to take the half of the coat or the cap itself. The only difference which, as I think, can be made between them, is this: wherever it can be ascertained, by reference to the regulations and to usages, that any particular article, or number of articles, is sufficient for six months' use, there the volunteer for six months may be limited to such articles—as, for example, I understand that three pairs of boots are furnished for each year; evidently proceeding on the idea that each pair will last, on the average, four months. A volunteer for twelve months is entitled to an allowance for all three; but a volunteer for six may properly be limited to *two*; but, for the reasons above stated, he cannot be reduced to one.

B. F. BUTLER.

TO THE PRESIDENT OF THE UNITED STATES.

VOL. III—11

Payment of Expenses of Florida Volunteers and Militia.

PAYMENT OF EXPENSES OF FLORIDA VOLUNTEERS AND
MILITIA.

No allowance for horses or other property impressed into the service of the United States, nor for any special damage done to individuals or their property by the troops of the United States or the enemy, can be allowed by the first section of the act of 28th May, 1836.

This act does not extend to the pay and other allowances to be made to the militia or volunteers, which, by the second section, are placed on the same footing with those of militia and volunteers ordered into service by orders from the War Department. Of expenses incurred and supplies furnished, not of the like nature with those specially named in the abstract, only those are to be allowed which were known to the military service, having reference, in the cases both of expenses and supplies, to the character of each corps.

WAR DEPARTMENT,
November 8, 1836.

SIR: Having examined the first section of the act "to provide for the payment of expenses incurred and supplies furnished on account of the militia or volunteers received into the service of the United States for the defence of Florida," approved May 28, 1836, I am of opinion—

1. That this section does not authorize any allowance for horses or other property *impressed* into the service of the United States; nor for any special damage done to individuals or their property by the troops of the United States or the enemy. Cases of this sort have, heretofore, always been provided for by special acts of Congress; and the words of this law are not broad enough to authorize a departure from such practice.

2. That, by the construction given by the Secretary of War, through the Quartermaster General, under date of June 8, 1836, it is decided that the act of May 28, 1836, authorized payment to be made for all expenses actually incurred, and for all supplies actually furnished, on account of militia or volunteers received in the service of the United States, which were specially enumerated in the abstract submitted on the 26th of March, 1836, by the Secretary of War to the House of Representatives, or which, though not specially mentioned in that abstract, are of the like nature with those mentioned therein.

3. Though I do not intend to overrule the construction so given, I cannot extend it to any other cases; and, therefore, I decide—

Priority of the United States over other Creditors.

1. That it does not extend to the pay and other allowances to be made to the militia or volunteers which, by the second section, are placed on the same footing with those of militia and volunteers ordered into service by orders from the War Department.

2. That, as to expenses incurred and supplies furnished, not of the *like nature* with those specially named in the abstract, those only are to be allowed which were known to the military service, having reference, in the cases both of expenses and supplies, to the particular character of each corps.

B. F. BUTLER,

Secretary of War ad interim.

TO PETER HAGNER, Esq.,

Third Auditor.

PRIORITY OF THE UNITED STATES OVER OTHER CREDITORS.

The United States have the right to retain moneys awarded under the French treaty of 1831 to a firm, of which one member is indebted to the government upon a bond for duties on goods imported for the firm, and to apply the same upon the bonds.—(See case of *United States vs. Lyman*, 1 Mason, 482.)

OFFICE OF THE ATTORNEY GENERAL,

November 16, 1836.

SIR: I had the honor to receive soon after its date, but have somehow overlooked for too long a period, your letter of the 19th of July last, asking my opinion on the claim of the Union Bank of Maryland to the amount awarded to Hollins & McBlair, under the French treaty of 1831. It appears, from the papers enclosed to me, that the amount awarded to Hollins & McBlair is claimed by the bank as the assignees of that firm; but that the same has been retained in satisfaction of a larger sum due to the United States upon certain duty bonds executed by John S. Hollins, one of the members of the firm. In the memorial of the bank, this debt is treated as the individual debt of John S. Hollins; and it is, therefore, insisted that the property of the partnership cannot be taken to pay it. I perceive, however, that, in your letter to me, it is distinctly stated that the bonds in question were given for duties on importations by the firm.

Franking by the Executive Departments.

This being so, I am very strongly inclined to think that the United States are yet to be considered as creditors of the *firm*; and, consequently, that they are entitled to retain the whole amount. This view of the case is sustained by the opinion of Mr. Justice Story, in the case of the United States *vs.* Lyman, (1 Mason, 482;) and, until overruled by the decision of the Supreme Court of the United States, I think that opinion should be followed. On this subject, I beg leave to refer you also to my opinion in a somewhat analogous case under the Neapolitan treaty, transmitted to you under date of the 22d of June, 1835.

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

FRANKING BY THE EXECUTIVE DEPARTMENTS.

Postmasters cannot lawfully receive to be conveyed in the mail any packet weighing more than three pounds in any case whatever, except such as are specially provided for in the act of the 19th December, 1821, and the joint resolution of the 13th of January, 1831.

ATTORNEY GENERAL'S OFFICE,
December 13, 1836.

SIR: I have had the honor to receive your letter of the 25th of July last, asking my opinion on the question discussed in the correspondence between the Secretary of State and yourself, in respect to the weight of packets which may be sent, under the frank of the executive departments, through the mails. The reasoning relied on in your communication to me, and especially so much of it as is founded on the joint resolution of the 13th of January, 1831, is, in my judgment, very nearly, if not quite, decisive of the point in controversy. And I have since met with another joint resolution, which shows, beyond all reasonable doubt, that the Congress of 1830 also regarded the prohibition contained in the 13th section as a universal prohibition.

The resolution to which I refer was approved on the 30th of April, 1830, and is in the following words:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so

Patents for Inventions.

much of the thirteenth section of the act of the third of March, one thousand eight hundred and twenty five, as restricts the weight of packages by mail, shall not apply to the transmission of papers relating to the fifth census or enumeration of the inhabitants of the United States."

These two resolutions must be regarded as a legislative exposition of the act of 1825; and as the subject is one that relates to the administration of the public business, in which no private right is concerned, that exposition may and ought to be followed. I am accordingly of opinion that postmasters cannot lawfully receive, to be conveyed in the mail, any packet weighing more than three pounds, in any case whatever, except such as are specially provided for in the act of the 19th of December, 1821, and the joint resolution of the 13th January, 1831.

I am, sir, &c.,

B. F. BUTLER.

To the POSTMASTER GENERAL.

PATENTS FOR INVENTIONS.

Unless there be some error in the specification arising from inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, the patentee cannot surrender a patent which includes several distinct improvements and take out several new ones.

ATTORNEY GENERAL'S OFFICE,

December 15, 1836.

SIR: In answer to the question proposed in the letter of the Commissioner of Patents, enclosed in your communication of the 31st of October last, and on which you have requested my opinion, I have the honor to reply, that, in my judgment, there is no sufficient reason for departing from the construction which was given to the corresponding part of the former patent law, and the usage which obtained under it, in respect to the issuing of several patents in lieu of one patent surrendered.

As the charge on the new patent is reduced from thirty to fifteen dollars, the Commissioner suggests that the revenue may be defrauded, if a party be allowed first to include several

 Resolve of Massachusetts Concerning Deposites.

distinct improvements in one patent, and then to surrender the patent and take out several new ones; and, if the suggestion were well founded, it would certainly furnish a good reason for a more rigid construction of the present law than was given to the former statute. But, unless there be some error in the specification, arising from "inadvertency, accident, or mistake, and without any fraudulent or deceptive intention," the new patent cannot be issued; and as in the case supposed in the objection I am considering, there is a fraudulent design to elude the payment of the legal charge, of course such a case is not within the law.

I am, sir, &c.,

B. F. BUTLER.

To the SECRETARY OF STATE.

RESOLVE OF MASSACHUSETTS CONCERNING DEPOSITES.

The joint resolution of Massachusetts, approved by the governor of that State on the 9th of April, 1836, is not such a law as is contemplated by the thirteenth section of the act of the 23d of June, 1836, to regulate the deposits of the public money.

OFFICE OF THE ATTORNEY GENERAL,

December 19, 1836.

SIR: In answer to the question proposed to me in your letter of the 3d instant, I have the honor to state that, in my opinion, the joint resolution of Massachusetts, approved by the governor of that State on the 9th of April, 1836, is not such a *law* as is contemplated by the 13th section of the act of the 23d of June last, "to regulate the deposits of the public money;" and, consequently, that the share of the public money which, under that section, may be deposited with the State of Massachusetts, cannot be delivered upon that resolve.

Without meaning to say that a law, or a joint resolution having for this purpose the force of a law, might not have been framed in such comprehensive terms, although passed before the enactment of the deposite act, as to authorize the delivery of the public money in pursuance of that act, I am yet decidedly of opinion that the terms of the present resolve are not of

 Execution of Patents for Lands.

that character. It merely authorizes the treasurer "to receive any such sum or sums of money as may become *due* to the State of Massachusetts from the general government, consequent to the distribution of any portion of the public revenue among the several States of the Union." This language was evidently used under the impression that a law might be passed by Congress, directing an absolute distribution of some portion of the public revenue among the States, and in reference to such a law, and to no other. The authority of the treasurer is therefore limited to the receiving of public moneys distributed absolutely; and he cannot, under this resolve, pledge the faith of the State to receive a single *deposit* of the public money on the terms defined in the thirteenth section of the act of Congress.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

EXECUTION OF PATENTS FOR LAND.

All patents emanating from the General Land Office, whether of land sold, or of lands in respect to which private claims are recognised by acts of Congress, must be certified or countersigned by the recorder.

ATTORNEY GENERAL'S OFFICE,

December 23, 1836.

SIR: In reply to the question proposed by the Commissioner of the General Land Office, and referred to me in your communication of the 27th of October last, I have the honor to inform you that, in my opinion, all patents issuing from the General Land Office, whether of land sold, or of lands in respect to which private claims are recognised by acts of Congress as valid, or other lands, must be certified or countersigned by the recorder of the General Land Office.

It is true that the fourth section of the act of the 4th of July last, reorganizing the General Land Office, which prescribes the duties of the recorder, speaks only of patents for "public lands;" and it is therefore with much doubt and considerable hesitation that I have come to the above conclusion. But,

Payment of Arrearages to Contractors on Cumberland Road.

after looking at the question on several different occasions, and reflecting very maturely upon it, I am obliged to say that, in my judgment, the phrase "*public lands*," as used in the fourth section, must be regarded as a comprehensive generic phrase, designed to include all lands the title to which is so circumstanced as to require for its complete transmission a patent from the United States. The words may well enough admit of this enlarged construction; and, unless we adopt it, the most important duties of the recorder, as prescribed by the act, will be confined to those lands which are strictly "*public lands*;" that is to say, the recorder is to attend to the correct engrossing, recording, and transmission of patents, and to prepare alphabetical indexes of the names of patentees, and of persons entitled to patents, in those cases, and in those *only*, in which he is to certify and affix the seal of office; so that all those cases which are excluded in the latter respect from his jurisdiction must also be excluded in the other respects above mentioned. This surely could not have been intended by Congress; nor can I think it at all probable that they designed that one set of patents should be signed by one officer, and another set by another, when there is no reason, in the nature of the things themselves, for such a distinction, and no explicit direction to that effect contained in the law.

I am, &c.,

B. F. BUTLER.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

PAYMENT OF ARREARAGES TO CONTRACTORS ON CUMBERLAND ROAD.

Where a question concerning a doubtful allowance has been submitted to Congress, and an actual appropriation made by that body of the precise amount, there can be no valid objection to the payment.

ATTORNEY GENERAL'S OFFICE,
December 28, 1836.

In the case of Peter Early, it appears that the Secretary of War, on the 16th of March, 1830, ordered an allowance of

Payment of Arrearages to Contractors on Cumberland Road.

\$323 20 to be made to the claimant, a contractor on the Cumberland road in Ohio, for extra work between Canton and Zanesville; and that, during the session of 1834, the Chief Engineer submitted a list of arrearages due to contractors on said road in Ohio, and for which the War Department asked for an appropriation. Of these items, the amount allowed to Early was one; and the aggregate of the whole was \$1,609 36. By the act of the 27th of June, 1834, "to make appropriations for the civil and diplomatic expenses of government for the year 1834," an appropriation based on the above estimates was made in the following words: "For the payment of the arrearages due contractors on the Cumberland road in Ohio, \$1,609 36." The attorney of Mr. Early subsequently applied for payment; but the Second Comptroller, having doubts as to the case, applied to the Secretary of War for instructions. The Secretary declined deciding it; and, thereupon, the Second Comptroller disallowed the claim, thinking it not warranted by law. The case now comes to me upon the application of the present Second Comptroller, through the War Department, for an official opinion as Attorney General.

Upon the principles laid down by me in my communication to the Secretary of War of the 2d of April, 1834, there can be no valid objection to the payment of the claim. Whether the original allowance by the Secretary of War was proper or not, as an executive act, I think, after the application to Congress, and the submission of the precise allowance with the other arrearages, and the actual appropriation by law of the precise amount of all the items, it would be unreasonable to turn over the party to the vexation and delay of a special application to the legislature. As the document from the engineer department, now before me, was not submitted to the late Second Comptroller; and as I find no mention of the fact, that this particular claim was included in the estimate for arrearages in the papers before him, I presume it was unknown to him. Had it been brought to his notice, his decision would no doubt have been different.

Papers returned to War Department.

I am, &c.,

B. F. BUTLER.

Investment of the Chickasaw Funds.

SALARIES OF TERRITORIAL OFFICERS.

The salaries of judicial and other officers appointed for the Territory of Michigan are to be paid until the State shall have been actually admitted into the Union by the proclamation of the President.

ATTORNEY GENERAL'S OFFICE,
December 29, 1836.

SIR: In answer to the question proposed to me in your communication of the 16th ultimo, enclosing the letter of the First Auditor of the Treasury, I have the honor to state, that, in my opinion, the salaries of the judicial and other officers appointed for the Territory of Michigan, and for which appropriations were made in the act of the 9th of May, 1836, should be paid until the *State* shall have been actually admitted into the Union, by the issuing of the proclamation of the President, as heretofore provided by the act of the 15th of June, 1836, or by some special law hereafter to be enacted.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

INVESTMENT OF THE CHICKASAW FUNDS.

In case an investment in stocks having twenty years to run cannot be made, it will be proper to invest them in stocks redeemable at a later day.

ATTORNEY GENERAL'S OFFICE,
January 30, 1837.

SIR: In answer to the question proposed to me, on the subject of the investment of funds arising from the sale of lands belonging to the Chickasaws, as provided in the 11th article of the Chickasaw treaty of 1834, I have the honor to state: that in case it shall be found impracticable, on reasonable terms, to procure for such investment stocks which are redeemable within twenty years, as provided by the article, it will, in my opinion, be proper to invest such funds in such other secure stocks, having a longer time to run, as may be obtained on eligible terms. The great object of the provision was to provide a safe and productive investment; and if stocks of the particular kind

 Limitation of the Franking Privilege of Senators.

named in the treaty cannot be found, that object must be attained by adopting the nearest practicable mode. In regard to stocks not redeemable within twenty years, which have been already inadvertently purchased, I should think it proper so far to apply the principle above stated, as to retain those stocks on account of the Chickasaws, provided the department holding the fund shall be satisfied that the investment was really as beneficial to the Chickasaws as if such stocks as those named in the article had been purchased, and that it is now for their interest that the stocks actually purchased should be retained. It will, however, be proper to bring the subject before the tribe, as soon as it can conveniently be done, to the end that their assent may be obtained; and, should it be refused, the stock may then be sold, and a new investment made.

I have the honor, &c., &c.,

B. F. BUTLER.

To the PRESIDENT OF THE UNITED STATES.

 LIMITATION OF THE FRANKING PRIVILEGE OF SENATORS.

The taking a seat in a special session of the Senate called and held for Executive business, merely, and without any contemporaneous meeting of the House of Representatives, is not such a taking of a seat in Congress as will entitle a senator to the exercise of the franking privilege.

ATTORNEY GENERAL'S OFFICE,

March 2, 1837.

SIR: In answer to the question proposed to me in your letter of the 28th ultimo, I have the honor to inform you that, in my opinion, the taking of a seat in a special session of the Senate, called and held for executive business merely, and without any contemporaneous meeting of the House of Representatives, is not the taking of a seat "in Congress," within the meaning of the 6th section of the appropriation act of the 2d of March, 1833, so as to entitle the senator so taking his seat to the exercise of the franking privilege. There would seem to be great reason for extending the privilege to senators so circumstanced—at all events, from the time they take their seat in the special session; because, from the moment they

 Currency Receivable for Revenues.

enter on their official duties, they are subjected to communications addressed to them in consequence of that fact; but the omission, if it be an improper one, can only be remedied by further legislation.

I am, sir, &c., &c.,

B. F. BUTLER.

To the POSTMASTER GENERAL.

 CURRENCY RECEIVABLE FOR REVENUES.

The act designating and limiting the funds receivable for the revenues of the United States forbids the receipt of any bank notes except of such specie-paying banks as shall from time to time conform to certain conditions therein mentioned in regard to small bills, and restrains the Secretary of the Treasury from making any discrimination in this respect between the different branches of the public revenue.

It leaves to the Secretary of the Treasury power to prohibit the receipt of particular notes, provided his prohibition apply to both lands and duties, and to direct what particular notes allowed by law shall be received, provided he can find a deposite bank which will agree to receive and credit them as cash, and not otherwise.

The deposite banks are the sole judges of the notes to be received by them from any collector or receiver of public money, and are not bound to receive the notes of any other bank whose notes they may choose to reject; provided they apply the same rule to the United States which they apply to their other depositors.

ATTORNEY GENERAL'S OFFICE,
 March 3, 1837.

SIR: I have had the honor to receive the several questions proposed to me by you, on the bill which has just passed the two houses of Congress, entitled "*An act designating and limiting the funds receivable for the revenues of the United States,*" and which is now before me for consideration. These questions may be arranged under three general heads, and in that order I shall proceed to reply to them.

I. "Will the proposed bill, if approved, repeal or alter the laws now in force designating the currency required to be received in payment of the public dues, for lands or otherwise?"

"Will it compel the Treasury officers to receive the notes of specie-paying banks having the characteristics described in its first and second sections?"

“In what respect does it differ from, and how far will it change, the joint resolution of April 30, 1816?”

Answer.—In order to a correct reply to this question, and to any other question arising out of this obscurely penned bill, we must first obtain a general view of all its provisions.

The first section requires the Secretary of the Treasury to take measures for collecting the public revenue—first, in the legal currency of the United States, (i. e., gold and silver;) or, second, in the notes of such specie-paying banks as shall, from time to time, conform to certain conditions in regard to small bills described in the section. This section does not expressly give the Secretary power to direct that any particular notes *shall* be received for lands or for duties, but it *forbids* the receipt of any paper currency other than such bank-notes as are described in the section; and it requires the Secretary to adopt measures, in his discretion, to effectuate that prohibition.

The second section extends the prohibition still further, by forbidding the receipt of any notes which the banks in which they are to be deposited shall not, under the supervision and control of the Secretary of the Treasury, agree to pass to the credit of the United States as *cash*; to which is added a proviso, authorizing the Secretary to withdraw the public deposits from any bank which shall refuse to receive as cash, from the United States, any notes receivable under the law, which such bank receives, in the ordinary course of business, on general deposit.

The third and last section allows the receipt, as heretofore, of land scrip and treasury certificates for public lands; and forbids the Secretary of the Treasury to make any discrimination in the funds receivable (other than such as results from the receipt of land scrip or treasury certificates) between the different branches of the public revenue.

From this analysis of the bill, it appears that, so far as regards bank notes, the bill designates and limits their receivableness for the revenues of the United States—first, by forbidding the receipt of any, except such as have all the characteristics described in the first and second sections of the bill; and, secondly, by restraining the Secretary of the Treasury from making any discrimination in this respect between the different

Currency Receivable for Revenues.

branches of the public revenue. In this way the bill performs, to a certain extent, the office of "designating and limiting the funds receivable for the revenues of the United States," as mentioned in its title; but it would seem, from what has been stated, that it is only in this way that any such office is performed. This impression will be fully confirmed as we proceed.

This bill, should it be approved, will be supplementary to the laws now in force relating to the same subject; but as it contains no repealing clause, no provision of those former laws, except such as may be plainly repugnant to the present bill, will be repealed by it.

The existing laws embraced in the above question, and applicable to the subject, are—

1. *As to duties on goods imported.*—The 74th section of the collection law of the 2d of March, 1799, the first part of which, re-enacting in this respect the act of the 31st of July, 1789, provides "that all duties and fees to be collected shall be payable in money of the United States, or in foreign gold and silver coins, at the following rates," &c. The residue of the section, as to rates, has been altered by subsequent laws; and the clause quoted was varied during the existence of the Bank of the United States, the notes of which were expressly made receivable in all payments to the United States; and during the existence of the act making treasury notes receivable by such act: but in no other respect has it ever been repealed.

2. *As to public lands.*—The general land law of the 10th of May, 1800, section 5, provided that no lands should be sold "at either public or private sale, for less than two dollars per acre; and payment may be made for the same by all purchasers, either in specie or in evidences of the public debt of the United States, at the rates prescribed" by a prior law. This provision was varied by the acts relative to treasury notes and the Bank of the United States, in like manner as above mentioned. The second section of the general land law of the 24th of April, 1820, abrogated the allowance of credits on the sale of public lands after the 1st day of July then next; required every purchaser at public sale to make complete payment on the day of purchase; and the purchaser at private sale to pro-

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duce to the register a receipt from the Treasurer of the United States, or from the receiver of the district, for the amount of the purchase money. The proviso to the fourth section of the same law enacted, in respect to reverted lands and lands remaining unsold, that they should not be sold for a less price than one dollar and twenty-five cents per acre, "nor on any other terms than that of *cash* payment." This latter act has been further modified by the act allowing Virginia land scrip to be received in payment for public lands.

3. *As to both duties and lands.*—The joint resolution of the 30th of April, 1816, provides that the Secretary of the Treasury "be required and directed to adopt such measures as he may deem necessary to cause, as soon as may be, all duties, taxes, debts, or sums of money, accruing or becoming payable to the United States, to be collected and paid in the legal currency of the United States, or treasury notes, or notes of the Bank of the United States, as by law provided and declared, or in notes of banks which are payable and paid on demand in the legal currency of the United States; and that, from and after the twentieth day of February next, no such duties, taxes, debts, or sums of money, accruing or becoming payable to the United States, as aforesaid, ought to be collected or received otherwise than in the legal currency of the United States, or treasury notes, or notes of the Bank of the United States, or in notes of banks which are payable and paid on demand in the legal currency of the United States." According to the opinion given by me, as a member of your cabinet, in the month of July last, and to which I still adhere, this resolution was mandatory only as it respected the legal currency of the United States, treasury notes, and notes of the Bank of the United States; and in respect to the notes of the State banks, though payable and paid in specie, was permissive merely, in the discretion of the Secretary; and, in accordance with this opinion, has been the practical construction given to the resolution by the Treasury Department. It is known to you, however, that distinguished names have been vouched for the opinion that the resolution was mandatory as to the notes of all specie paying banks; that the debtor had the right, at his option, to

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make payment in such notes; and that, if tendered by him, the treasury officers had no discretion to refuse them.

It is thus seen that the laws now in force, so far as they *positively enjoin* the receipt of any particular currency in payment of the public dues, are confined to gold and silver, except that in certain cases Virginia land scrip and treasury certificates are directed to be received on the sale of public lands. In my opinion, there is nothing in the bill before me repugnant to those laws. The bill does not *expressly* declare and enact that any particular species of currency *shall be receivable* in payment of the public revenue. On the contrary, as the provisions of the first and second sections are chiefly of a *negative* character, I think they do not take away the power of the Secretary previously possessed under the acts of Congress, and as the agent of the President, to *forbid* the receipt of any bank notes which are not by some act of Congress expressly made absolutely receivable in payment of the public dues.

The above view will, I think, be confirmed by a closer examination of the bill. It sets out with the assumption that there is a currency established by law, (*i. e.* gold and silver;) and it further assumes that the public revenue of all descriptions ought to be collected exclusively in such legal currency, *or* in bank-notes of a certain character; and, therefore, it provides that the Secretary of the Treasury *shall* take measures to effect a collection of the revenue "in the legal currency of the United States, *or* in notes of banks which are payable and paid on demand in the said legal currency," under certain restrictions afterwards mentioned in the act.

The question then arises, are bank-notes, having the requisite characteristics, placed by the clause just quoted on the same footing with the legal currency, so as to make it the duty of the Secretary of the Treasury to allow the receipt of them, when tendered by the debtor? In my judgment, such is not the effect of the provision.

If Congress had intended to make so important an alteration of the existing law as to compel the receiving officers to take payment in the bank notes described in the bill, the natural phraseology would have been, "in the legal currency of the United States, *and* in notes of banks which are payable and

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paid in the said legal currency," &c. And it is reasonable to presume that Congress would have used such phraseology, or would have gone on to make a distinct provision, expressly declaring that such bank-notes *should be receivable*, as was done in the bank charters of 1790 and 1816, and as was also done by the acts relative to evidences of debt, treasury notes, and Virginia land scrip. The form of one of these provisions (the 14th section of the act incorporating the late Bank of the United States) will illustrate the idea I desire to present:

"SEC. 14. *And be it further enacted*, That the bills or notes of the said corporation, originally made payable, or which shall have become payable, on demand, *shall be receivable* in all payments to the United States, unless otherwise directed by act of Congress."

The difference between the language there used, and that employed in the present bill, is too obvious to require comment.

It is true that the word "*or*," when it occurs in wills and agreements, is sometimes construed to mean *and*, in order to give effect to the plain intent of the parties; and such a construction of the word may sometimes be given when it occurs in statutes, where the general intent of the law-makers evidently requires it. But this construction of the word in the present case is not only unnecessary, but, in my opinion, repugnant to the whole scope of the bill; which, so far from commanding the public officers to receive bank-notes in cases not required by the existing laws, introduces several new prohibitions on the receipt of such notes.

Nor do I think this one of those cases in which a choice is given to the debtor to pay in one or other of two descriptions of currency, both of which are receivable by law. Such a choice was given by the land law of the 10th of May, 1800, (section 5,) between specie and the evidences of the public debt of the United States then receivable by law; and also by the joint resolution of the 30th of April, 1816, between the "legal currency of the United States, or treasury notes, or notes of the Bank of the United States, as by law provided and declared." The option given by that resolution continued in force so long as the laws providing and declaring that treasury

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notes and notes of the Bank of the United States should be receivable in payments to the United States, and ceased when those laws expired. The distinction between that description of paper currency which is by law expressly made receivable in payment of public dues, and the notes of the State banks, which were only permitted to be received, is plainly marked in the resolution of 1816. While the former are placed on the same footing with the legal currency, because, by previous laws, it had been so "provided and declared," the latter were left to be received, or not received, at the discretion of the Secretary of the Treasury; except that he was restricted from allowing any to be received which were not payable and paid on demand in the legal currency. The bank-notes spoken of in the bill before me, having never been made receivable by law, must be regarded as belonging to the latter class, and not to the former; and there can, therefore, be no greater obligation under the present bill, should it become a law, to receive them in payment, than there was to receive the paper of the State banks under the resolution of 1816.

As to the difference between this bill and the joint resolution of 1816, the bill differs from that resolution in the following particulars:

1. It says nothing of treasury notes, and the notes of the Bank of the United States, which, by the resolution of 1816, are recognised as having been made receivable, by laws then in force, in payment of public dues of all descriptions.

2. It abridges the discretion left with the Secretary of the Treasury by that resolution, by positively forbidding the receipt of bank-notes not having the characteristics described in the first and second sections of the bill; whereas the receipt of some of the notes so forbidden might, under the resolution of 1816, have been allowed by the Secretary.

3. It forbids the making of any discrimination in respect to the receipt of bank-notes between the different branches of the public revenue; whereas the Secretary of the Treasury, under the resolution of 1816, was subject to no such restraint, and had the power to make the discrimination forbidden by this bill, except as to the notes of the Bank of the United States and treasury notes.

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This bill, if approved, will change the resolution of 1816, so far as it now remains in force, in the second and third particulars just mentioned; but, in my opinion, as already suggested, will change it in no other respect.

II. "What is the extent of the supervision and control allowed by this bill to the Secretary of the Treasury, over the notes to be received by the deposit banks? And does it allow him to direct what particular notes shall or shall not be received for lands or for duties?"

Answer. After maturely considering, so far as time has been allowed me, the several provisions of the bill, I think the following conclusions may fairly be drawn from them, when taken in connexion with the laws now in force and above referred to; and that, should it become a law, they will properly express its legal effect:

1. That the Secretary of the Treasury cannot direct the receipt of any notes, except such as are issued by banks which conform to the 1st section of the law, and such as will be passed by the proper deposit bank to the credit of the United States as *cash*.

2. That he may direct the receipt of notes issued by banks which conform to the 1st section, provided the deposit bank in which the notes are to be deposited shall agree to credit them as cash.

3. That, if the deposit bank in which the money is to be deposited shall refuse to receive as cash the notes designated by the Secretary, and which such bank receives in the ordinary course of business on general deposit, he may withdraw the public deposits, and select another depository which will agree to receive them.

4. That, if he cannot find a depository which will so agree, then, that the Secretary cannot direct or authorize the receipt of any notes except such as the deposit bank primarily entitled to the deposits will agree to receive and deposit as cash.

5. That, although a deposit bank might be willing to receive from the collectors and receivers, and to credit as *cash*, notes of certain banks which conform to the first section; yet, for the reasons before stated, I am of opinion that the Secretary is not *obliged* to allow the receipt of such notes.

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6. The Secretary is forbidden to make any discrimination, on the funds receivable, "between the different branches of the public revenue;" and therefore, though he may forbid the receipt of the notes of any particular bank, or class of banks, not excluded by the bill, and may forbid the receipt of notes of denominations larger than those named in the bill, yet, when he issues any such prohibition, it must apply to all the branches of the public revenue.

7. If I am right in the foregoing propositions, the result will be, that the proposed law will leave in the Secretary of the Treasury power to *prohibit* the receipt of particular notes, provided his prohibition apply to both lands and duties; and power to *direct* what particular notes allowed by law shall be received, provided he can find a deposit bank which will agree to receive and credit them as cash.

III. "Are the deposit banks the sole judges, under this bill, of what notes they will receive? or are they bound to receive the notes of every specie-paying bank, chartered or unchartered, wherever situated, in any part of the United States?"

Answer. In my opinion, the deposit banks, under the bill in question, will be the sole judges of the notes to be received by them from any collector or receiver of public money; and they will not be bound to receive the notes of any other bank whose notes they may choose to reject, provided they apply the same rule to the United States which they apply to their other depositors: in other words, the general rule as to what notes are to be received as cash, prescribed by each deposit bank for the regulation of its ordinary business, must be complied with by the collectors and receivers whose moneys are to be deposited with the bank. But it does not therefore follow that those officers will be bound to receive what the bank generally receives, because, as already stated, they may refuse, of their own accord, or under the direction of the Secretary of the Treasury, any bank notes not expressly directed by act of Congress to be received in payment of the public dues.

I have thus answered the several questions proposed on the bill before me, and, though I have been necessarily obliged to examine the subject with much haste, I have no other doubts as to the soundness of the construction above given, than such

Salaries of Clerks and Messengers of Pension Office.

as belong to discussions of this nature and a proper sense of the fallibility of human judgment. It is, however, my duty to remind you that very different opinions were expressed in the course of the debates on the proposed law, by some of the members who took part therein. It would seem, from those debates, that the bill (in some instances at least) was supported under the impression that it would compel the treasury officers to receive all bank-notes possessing all the characteristics described in the first and second sections; and that the Secretary of the Treasury would have no power to forbid their receipt. It must be confessed that the language is sufficiently ambiguous to give some plausibility to such a construction; and that it seems to derive some support from the refusal of the House of Representatives to consider the amendment reported by the Committee of Ways and Means of that House, which would, substantially, have given to the bill, in explicit terms, the interpretation I have put on it, and have removed the uncertainty which now pervades it. Under these circumstances, it may reasonably be expected that the true meaning of the bill, should it be passed into a law, will become a subject of discussion and controversy, and probably remain involved in much perplexity and doubt, until it shall have been settled by a judicial decision. How far these latter considerations are to be regarded by you in your decision on the bill, is a question which belongs to another place, and on which, therefore, I forbear to enlarge in this communication.

I have the honor, &c., &c.,

B. F. BUTLER.

To the PRESIDENT OF THE UNITED STATES.

SALARIES OF CLERKS AND MESSENGERS OF PENSION OFFICE.

The clerks and messengers of the Pension Office authorized by the act of the 9th May, 1836, are entitled to the increase of salaries provided by the enacting clause of the third section of the act of the 3d March, 1837.

ATTORNEY GENERAL'S OFFICE,

March 25, 1837.

SIR: In answer to the question proposed by the Commissioner of Pensions, I have the honor to inform you that, in my

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opinion, the clerks and messengers of the Pension Office authorized by the act of the 9th of May, 1836, are entitled to the increase of salaries provided by the enacting clause of the 3d section of the act of the 3d instant, "making appropriations for the civil and diplomatic expenses of government for the year 1837." Their salaries, though provided for by a "law of the last session of Congress," (i. e., the act of the 9th of May, 1836,) were not *fixed* by that law: because a gross sum was appropriated for the purpose of paying an indefinite number of clerks and messengers; and, therefore, the first proviso of the 3d section above referred to does not apply to them. Even had the salaries of the messengers been *fixed* by any such law, the proviso would not extend to them, because it is expressly confined to clerks.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

 PRE-EMPTIONS.

By the terms "settlers" and "occupants" used in the pre-emption acts, is meant those who personally cultivate and reside on, or who personally cultivate, use, and manage the public lands.

Actual residence on the land is not indispensable, yet with cultivation it is the highest evidence of that personal connexion which is indispensable.

The head of a family, whose dwelling is not on the land, but who improves and cultivates by the application of his personal labor or by that of his family, hired men, servants, or slaves under his direction, is entitled to the benefits of the law.

The law of landlord and tenant is inapplicable to the subject of pre-emptions; yet, as it has been made the basis of instructions, the rule ought to be followed. The act of 2d July, 1836, confirms such entries.

A pre-emptor cannot be undermined by a subsequent fraudulent purchaser.

The pre-emption acts of May, 1830, and June, 1834, together with former opinions touching them, are in this opinion re-examined and fully explained.

ATTORNEY GENERAL'S OFFICE,

March 29, 1837.

SIR: Pursuant to the request contained in your letter of the 2d instant, I proceed to state my opinion on the several questions proposed by the Solicitor of the General Land Office, in the case of Adams and Lapsley, and which are as follows:

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"1. Whether the application of the law to the facts, under the opinions of the Attorney General and Secretary, and the instructions of the General Land Office, is, or is not, correct?"

If I correctly understand the object of this question, the Solicitor desires a re-examination of that part of my opinion in this case of the 21st June, 1836, in which a definition was given of the terms "*settler*" and "*occupant*," as used in the acts of the 29th May, 1830, and the 19th June, 1834. The observations then made on this point were as follows: "There is some difference in the meaning of the words '*settler*' and '*occupant*.' It cannot be said, with much propriety, that one is an '*occupant* of the public lands,' unless he actually and personally resides on, or personally occupies or uses such lands; but I suppose that a person who places a family or an individual on the public lands, and thus *causes* a settlement to be made, may, in an enlarged sense of the term, properly enough be called '*a settler of the public lands*,' notwithstanding he may not personally occupy the same. But I do not believe that Congress intended, in the provision before me, to recognise this distinction. The title of the act of 1830 is as follows: '*An act to grant pre-emption rights to settlers on the public lands*,' (not *of* the public lands;) and though the word '*occupant*' is not used, yet the preposition '*on*' necessarily restricts the word '*settler*' to one who personally occupies and resides on, or personally occupies and uses the public lands, and excludes all idea of settlement by proxy.

"The first enacting clause of the act of 1830, like that of 1834, commences with the phrase '*every settler or occupant of the public lands*;' but it is evident, from the whole context, as well as from the general spirit of all our pre-emption laws, that this phrase was deemed equivalent, and only equivalent, to the words used in the title. The same remark applies to the section above quoted from the act of 1834; and I am therefore of opinion that no person can be deemed '*a settler or occupant*,' within the meaning of that section, unless he shows that he had *personally* settled *on* the public lands prior to the 19th June, 1834."

I adhere to the general views expressed in the above extract; and I do not know that I can make the language more precise,

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unless it be by repeating, in respect to the last sentence, what had been twice stated in the prior parts of the paragraph,—that I regard those persons, and those only, as “settlers or occupants,” within the meaning of the law, who either—

1. Personally cultivate and reside on the public lands; or,
2. Personally cultivate, use, and manage, the public lands.

In other words, I regard the words “settler” and “occupant” as used synonymously; and I think it necessary, in order to constitute either a “settler” or an “occupant,” within the meaning of the law, that the party shall have a direct *personal* connexion with the land claimed by him.

Residence or inhabitancy *on* the land, in addition to cultivation, is the highest degree of such personal connexion of which the subject is susceptible; but I have not supposed that actual residence or inhabitancy on the land was indispensable. A single man, by personal labor, may make an improvement on a particular quarter section, and reduce it to cultivation; but although he may board and lodge elsewhere, such a person, in my opinion, may well be regarded as a *settler* and *occupant* of the public lands. So, too, may the head of a family, whose dwelling is not on the public land, but who actually improves and cultivates a tract of public land by the application of his personal labor and the labor of his family, or by the application of the labor of his family alone, under his immediate personal direction. In his *family*, I mean to include domestic servants and hired men, and, where slavery is authorized, slaves.

So far as regards the labor of all such persons, I think that when applied to the improvement and cultivation of the public lands, it should be deemed the labor of the head of the family, and that he is entitled, for all the purposes of the pre-emption laws, to the benefit of the maxim “*qui facit per alium, facit per se.*” But I have supposed that this liberality of construction could not, with propriety, be so far extended as to give to a person who takes possession of a tract of public land, and, before such possession has ripened into a pre-emption right, leases the tract to another, the benefit of the cultivation and possession of the latter. Such a lessor, as between himself and the United States, is a mere trespasser, and has no authority to make a lease. It is true, the lessee, as between himself and

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his lessor, cannot dispute the lessor's title; and the possession of the lessee is regarded, in ordinary cases, as the possession of the lessor; but, in my judgment, these principles are inapplicable to cases under the pre-emption laws, which, as already explained, seem to demand a more direct personal connexion with the cultivation and settlement of the land, than such as can be effected through the agency of a tenant.

In connexion with this point, my attention has been called by the Solicitor of the Land Office to the opinion of one of my predecessors, Mr. Berrien, on several questions arising on the act of the 29th May, 1830, and to the regulations in accordance therewith, prescribed by the Commissioner. In reply to the question, "In cases where the first settler rented his improvements to another person, *who* is entitled to the right of pre-emption conferred by the act—the landlord or the tenant?" Mr. Berrien, under date of the 23d of August, 1830, gives the following answer: "I am of opinion that the right of pre-emption belongs to the landlord. That a lessee cannot dispute the title of his lessor, and that the possession of the former is to be considered as the possession of the latter, are settled principles of law, founded in justice and policy. They seem to me to point very clearly to the conclusion which I have stated; and if the object of pre-emption laws be, as I suppose it is, to compensate the occupant for the labor and expense incurred in making his settlement, this consideration will lead to the same result. This opinion is strengthened by the provision in the third section, which declares 'that all assignments and transfers of the right of pre-emption given by this act, prior to the issuing of patents, shall be null and void.'" It will be seen, by the very terms of the question, that it was taken for granted by the General Land Office, and by the Secretary of the Treasury, that one or other of the parties in the case stated was entitled to the pre-emption; a view of the subject to which I cannot subscribe, because I think it very plain that cases may exist in which the land may have been cultivated and possessed for the term required by the law, and yet not long enough by *any one person* to entitle him to its benefits. The manner in which the question was put was somewhat calculated to divert the attention of my predecessor

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from the real difficulties of the case, and his reasoning has not convinced me of the soundness of his conclusions. The above quoted opinion, not being noted in the index of the record-book kept in the office, was unknown to me when my former opinion was prepared. Had I then been acquainted with it, and with the fact (now communicated to me) of its having been adopted by the Secretary and Commissioner as the basis of instructions to the land officers, I should have deemed it unnecessary and improper to enter into a discussion of the points settled by it, and, in accordance with the usual course of the office, would have adopted and applied, so far as it extended, the decision of Mr. Berrien; and although not yet convinced that my own construction of the statute is erroneous, I think this a proper case for advising your department to adhere to his exposition rather than to mine.

The point on which we differ is by no means free from doubt; and as the views of my predecessor were deliberately adopted by the department, and as many cases have no doubt been disposed of on the principle established by him, it would seem to be due to certainty and uniformity of judgment that the first decision should be followed—at all events, in all cases arising under the act of 1830.

“2. Whether, or not, title is confirmed to Adams by the act of the 2d July, 1836?” This act is in the following words:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where public lands, taken from the bounds of a former land district, and included within the bounds of a new district, have been sold by the officers of such former district, under the pre-emption law or otherwise, at any time prior to the opening of the land office in such new district, and in which the Commissioner of the General Land Office shall be satisfied that the proceedings in other respects have been fair and regular, such entries and sales shall be, and are hereby, confirmed; and patents shall be issued thereupon, as in other cases.

“And be it further enacted, That in all cases where any entry has been made under the pre-emption laws, pursuant to instructions sent to the register and receiver from the Treas-

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ury Department, and the proceedings have been in all other respects fair and regular, such entries and sales are hereby confirmed, and patents shall be issued thereon, as in other respects."

The entry of Adams was made pursuant to instructions sent to the register and receiver from the Treasury Department, on the 7th February and 17th October, 1831; and the entry and sale are, therefore, confirmed by the *second* of the above sections, provided the proceedings have been fair and regular in all respects other than the irregularity of making the sale after the erection of the Danville district.

This irregularity is to be excepted, because cured by the first section, and therefore tacitly excepted from the irregularities and unfairness referred to in the second section, as explained in my opinion of the 10th of August last. And even had the law been confined to the first section, I think it would have been sufficient to confirm the title of Adams; because, in my opinion, a sale of the tract in question was substantially made to him by the officers of the Vandalia land district, prior to the opening of the land office in the new district.

"3. Whether a pre-emptor has not rights which he can protect against a subsequent purchaser, who acquires his inceptive title in fraud of the same?"

If the term "pre-emptor," as used in this question, be intended to designate a party who has actually made such a settlement and cultivation as to bring himself within the provisions of the pre-emption law, (and no other can properly be called a "*pre-emptor*,") I shall have no hesitation in answering the question in the affirmative.

The possession of such a party is notice to all the world of his equitable title to the benefits proffered by the pre-emption law; and, until the expiration of the time limited by the law, he has the right to avail himself of those benefits, and no third person can be allowed to intercept or defeat them.

It will, however, be seen by the report of the Solicitor of the Land Office, in another case, (No. 57,) that, in framing this question, he did not intend to confine the word *pre-emptor* to the case above stated, but meant to embrace by it every actual settler and occupant of the public lands, whether entitled to the

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preference in purchasing given by the pre-emption law or not. It will also be seen by that report, that the Solicitor is of opinion that the possession of every such settler is secured from the claims of persons havng *floating rights* under these acts, by the last clause of the second section of the act of the 29th of May, 1830. I cannot concur in this opinion. The "right of preference" referred to in that clause, is, in my judgment, the same right of pre-emption, or the right of purchasing at the minimum price in preference to all other persons, which is secured by section first. No other "right of preference" is known to the acts of Congress and, in some of the early pre-emption laws, the privilege conferred on the settler is described in this very way. I am, therefore, of opinion that the settler on the public lands has no legal right to his possession as against the United States and purchasers from the United States, except where he is embraced by, and actually complies with, the provisions of a pre-emption law. Whether the actual possessions of other settlers ought not to be protected from floating claims, is a question which belongs exclusively to Congress, and which would seem to deserve the attention of that body.

Perhaps, also, it may be expedient to suspend the application of such claims to those possessions, until the sense of Congress can be taken on the subject.

"4. Whether individuals residing without the land district, or in a distant part of the State, and claiming pre-emption in virtue of the occupancy and cultivation of others, placed on the public lands as *tenants*, are entitled to pre-emption in any case?"

This question, I presume, will have been sufficiently met in the remarks above submitted in reply to the first question.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

The Hon. LEVI WOODBURY,

Secretary of the Treasury.

POWER OF SENATE RESPECTING NOMINATIONS TO OFFICE.

The Senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations; and such nominations fail whenever it disagrees to them.

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The Senate may suggest conditions and limitations to the President, but cannot vary those submitted by him; for no appointment can be made, except on his nomination, agreed to without qualification or alteration.

In the case of John R. Coxe, jr., nominated for lieutenant in the navy from date, and confirmed, with the qualification that he shall take rank next after Lieutenant Elisha Peck, a commission cannot properly issue.

ATTORNEY GENERAL'S OFFICE,

March 29, 1837.

SIR: In the case of Mr. Coxe, referred to me by your letter of the 7th instant, it appears that the President, on the 16th ultimo, nominated him to the Senate as follows: "To the Senate of the United States: I nominate John R. Coxe, jr., to be a lieutenant in the navy from this date;" and that the Senate, on the 3d instant, adopted a resolution in the following words: "*Resolved*, That the Senate advise and consent to the nomination of John R. Coxe, to be a lieutenant in the navy, to take rank next after Lieutenant Elisha Peck."

On this case you request my opinion "whether Mr. Coxe can be commissioned agreeably to the nomination by the President, or in accordance with the resolution of the Senate, which will place him on the register above one hundred and sixty-two lieutenants, next after Lieutenant Elisha Peck; or whether he can properly be commissioned as a lieutenant in the navy?"

After maturely considering the above case, I am of opinion that Mr. Coxe cannot properly be commissioned as a lieutenant in the navy. The Senate has no power to originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nomination. Whenever the Senate disagrees to such a nomination, it fails; and no appointment can be made, except on a new nomination to be made by the President. Suggestions as to the views of the Senate in cases where that body disagrees to the President's nomination, may, no doubt, be informally communicated to him; but should he think it proper to conform to those views, I know of no way in which it can be done, consistently with the provisions of the constitution, except by the making of a new nomination in accordance therewith. In the present case, there is a disagreement between the two branches of the appointing power; and the nomination must fail, unless the date

Power of Senate respecting Nominations to Office.

of the rank can be separated from the office itself, and the commission be issued for the office, (on the ground that the President and Senate have agreed to that extent,) without saying anything of the date of Mr. Coxe's rank. In effect, however, such a commission would be substantially in accordance with the President's nomination; because, where nothing is said as to date, the officer takes rank from the time of his appointment. But such a result would be directly repugnant to the resolution of the Senate; and, therefore, the commission ought not to be issued in that form. The only other form which can be adopted, is to issue the commission agreeably to the resolution of the Senate—that is, expressly declaring that Mr. Coxe shall take rank next after Lieutenant Peck. This, however, would involve the irregularity of making the Senate, so far as regards the date of rank, the proposers of the measure; thus reversing the order of action prescribed by the constitution. The consequence is, that, in the present posture of the matter, the commission cannot issue at all.

This case involving constitutional questions of much practical importance, I have thought it useful to examine the executive journal of the Senate, so far as printed for public use, for the purpose of ascertaining whether any proceedings of the like nature have heretofore occurred. I find the following, which are somewhat analogous: On the 4th of May, 1822, President Monroe nominated Colonels House and Fenwick and Major Eustis for promotion in the army, with dates of rank in each case, from a prior day specified in the nomination. On the 6th of May, 1822, the Senate acted on these nominations. In each case the question was divided, and the vote taken first on the proposed promotion, and then on the date of rank; the former was determined in the *affirmative*, and the latter in the *negative*. The President, as I learn from the Adjutant General, must have regarded the action of the Senate as complete, because he issued the commissions in conformity to the decision of that body. Nothing being said as to the date of rank in the commissions, the officers receiving them, of course, took rank from their appointments. These cases would seem to show that, in the judgment of the Senate and of President Monroe, the date and rank may be separated from the office

Power of Senate respecting Nominations to Office.

itself; this, perhaps, may be done where the President nominates, as in the cases referred to, with rank from a prior day, and the Senate strike out the rank altogether; thus reducing it to the date of the appointment. The nomination of a *superior rank* may, perhaps, be said to include the *inferior*; and it is certain that if the President chooses to accept such a confirmation, and to issue a commission thereon, he will do no injustice to other officers. I suppose, too, that he may afterwards submit a new nomination for the same office, to rank from an earlier date, and thus obtain a reconsideration of the subject. But neither of these remarks can be applied to the case before us.

On the 16th of January, 1826, President Adams nominated Daniel Bissell to be colonel of the 2d regiment of artillery. On the 24th of that month the Committee on Military Affairs recommended the confirmation of the nomination, with the addition that Colonel Bissell should take rank from the 15th of August, 1812, and they submitted a resolution to that effect. The report and resolution were laid on the table; but, on the 2d of February, 1826, the following resolution was adopted by a vote of 37 to 2.

“ *Resolved*, That, in the opinion of the Senate, Daniel Bissell is entitled to the place of colonel in the army of the United States, taking rank as such from the 15th of August, 1812; with the brevet rank of brigadier general from the 9th of March, 1814; and that the President of the United States may arrange him accordingly.”

This resolution, with the report and other proceedings, was laid before the President, who, on the 11th of April, 1826, transmitted to the Senate a message dissenting from the opinion of the Senate, stating his reasons for not regarding the resolution of the Senate as a decision on the nomination, and inviting a definitive decision thereon. [See executive journal, vol. 3, page 519.] The subject being recommitted with the last message of President Adams to the committee, that committee, on the 22d of May, 1826, made a further report, which concluded with a recommendation that the Senate should not advise and consent to the appointment “in the manner in which the nomination has been made.” It was thereupon resolved that the nomination lie on the table; and it does not

Power of Senate respecting Nominations to Office.

appear to have been afterwards taken up. Previous to the making of this report, and on the 17th of April, 1826, Mr. Eaton submitted the following motion:

“ *Resolved*, That the nomination of Daniel Bissell to be colonel of the 2d regiment of artillery is unnecessary, for the reasons—

“ 1st. That he is already in the army, and should be arranged agreeably to the provisions of the act of 1821, for reducing the army.

“ 2d. That an appointment to take effect now, would be an act of injustice to Colonel Bissell, by placing him in a rank different from what he is entitled to claim by existing laws.”

This motion was on the same day considered and laid on the table.

It is difficult to say that any particular point is settled by the proceedings in the case of Colonel Bissell; but it would seem to have been admitted by the Senate, that, without a new nomination by the President, expressly adopting the rank to which that body deemed Colonel Bissell entitled, it could not be conferred upon him. Had the Senate supposed it possessed the power to confirm the nomination as to the office, with the addition of a prior date as to rank, (the course taken in Mr. Coxe's case,) it is scarcely to be doubted that such would have been its action, especially as it was recommended by the military committee in their first report.

The above precedents, so far as any information is to be gathered from them, are, therefore, in accordance with the views above expressed; and the last one cited illustrates the propriety and advantage of a strict adherence to the provisions of the constitution in the exercise of the appointing power. The harmony of the two co-ordinate branches, the independence of the President, the just weight of the Senate, and the useful operation of the power itself, will, no doubt, be best secured by confining each branch to its peculiar functions, and not allowing either to deviate from the order of procedure prescribed by the constitution.

I am, sir, &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Pay of Clerks in the General Land Office.

PAY OF CLERKS IN THE GENERAL LAND OFFICE.

The salaries of three clerks only in the General Land Office were fixed in the act reorganizing it. All the residue, including the messengers, are entitled to the per-centage granted by the act of 3d March, 1837.

ATTORNEY GENERAL'S OFFICE,

March 31, 1837.

SIR: I have considered the questions submitted by the Commissioner of the General Land Office in respect to the clerks, packers, and recorder of that office. In my opinion, all the clerks authorized to be employed for the service of the General Land Office, by the tenth section of the act "to reorganize the General Land Office," approved July 4, 1836, except the principal clerks, are entitled to the increase given by the enacting clause of the 3d section of the civil appropriation act of the 3d of March, 1837. The salaries of the principal clerks were fixed by the tenth section of the act of July 4, 1836, but those of all the clerks provided for in the subsequent part of the section are left to be fixed by the Commissioner at sums not exceeding certain prescribed amounts. The distinction between the principal clerks and these latter clerks, and between them and the clerks provided for by the forty-third and forty-fourth sections of the post office law of the 2d July, 1836, is well stated by the Solicitor of the General Land Office, in whose general reasoning on the subject I fully concur.

I am of opinion that the messengers in the General Land Office are entitled to the increase given by the late law; but I do not see how it can be extended to the packers. The duties of the latter are specially defined in the act "to reorganize the General Land Office;" they are different from the duties of messengers and assistant messengers; and being different, a new and distinct appellation is given to them, which is not mentioned in the act of March 3, 1837. Its omission in the latter act was probably occasioned by inadvertence; but the executive departments must take the law as they find it.

The salary of the recorder, at \$2,000 per annum, as fixed by the act of the 3d instant, commences with the 1st of January last. I found this opinion on the title of the law, which declares it to be an act "making appropriations for the civil and

Pensions to Widows and Orphans.

diplomatic expenses of the government for the year 1837;" taken in connexion with the provision that the annual salary of the recorder "shall be \$2,000." As the latter clause is not accompanied by any provision designating the period from which it is to take effect, it would, according to the general rule of interpretation, be confined to the date of the President's approval, were it not that the title carries it back to the commencement of the year 1837.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY,
Secretary of the Treasury.

PENSIONS TO WIDOWS AND ORPHANS.

Widows of officers, seamen, or marines are not entitled to pensions under the act of the 3d of March, 1837, who remarried before the passage of the act.

Children of decedent officers, &c., whose widows married before the passage of the act, are entitled to the half-pay granted by it until they arrive at the age of twenty-one years.

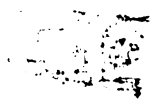
ATTORNEY GENERAL'S OFFICE,

April 7, 1837.

SIR: In answer to the questions arising in the case of the late widow and of the children of Purser Timberlake, referred to in your letter of the 27th ultimo, I have the honor to inform you that, after due consideration of the act of 3d of March, 1837, "for the more equitable administration of the navy pension fund," I am of opinion—

1. That to entitle a woman, as the *widow* of an officer, seaman, or marine, to the pension given by the law, she must have remained in a state of widowhood. The party serving must die *leaving a widow*; and it is "*such widow*"—that is, the *widow left by the decedent*, and the widow of the decedent—who is entitled. Mrs. Timberlake, having remarried, *can*, therefore, claim no benefit under the act.

2. That where the decedent has left a widow and children, and the former has married before the passage of the act, the children, within the equity of the law, and by a liberal construction of its provisions, are entitled to its benefits. I am



Pre-emptions.

accordingly of opinion that the children of Purser Timberlake are entitled to the half pay granted by the first section of the act, from the death of their father, to cease on their death, or on their attaining the age of twenty-one years.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

PRE-EMPTIONS.

The act of the 14th of July, 1832, is an amendment of the act of 1830, which is revived by the act of June 19, 1834, and is to be considered a part thereof.

ATTORNEY GENERAL'S OFFICE,

April 8, 1837.

SIR: I have very maturely considered the case referred to me by your letter of the 28th February, as stated in the correspondence between the Commissioner of the General Land Office and the honorable Dixon H. Lewis. So far as regards the particular questions discussed in that correspondence, I concur in the views taken by the Commissioner.

But there is, in my opinion, a very plain and clear ground for reaching the equity of the case, and giving to the parties represented by Mr. Lewis the benefits they seek.

The first section of the act of the 14th of July, 1832, supplemental to the act of the 29th of May, 1830, provides "that all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption, according to the provisions of the act of Congress approved the twenty ninth day of May, eighteen hundred and thirty, and who have not been, or shall not be, enabled to make proof and enter the same within the time limited in said act, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale on account of a disputed boundary between any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions in every respect as are prescribed in said act, within one year after the surveys are made, or the land attached to a land dis-

Pensions to Widows.

strict, or the boundary line established; and if the said land shall be proclaimed for sale before the expiration of one year, as aforesaid, then they shall be entered before the sale thereof."

This act was evidently passed under a conviction that the cases embraced in it were within the equity of the original law, and that justice and reason required that they should be provided for. It may therefore well be regarded as one of those amendments of an original law, which become so incorporated therewith as to be revived by the revival of the original, agreeably to the well-known rule of construction which I have already applied in a similar case to this very subject. (See my opinion of the 6th of March, 1835.)

I am accordingly of opinion that the act of the 14th of July, 1832, is to be deemed a part of the act of the 29th of May, 1830, and that it was revived therewith by the act of the 19th of June, 1834.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY.

PENSIONS TO WIDOWS.

The widows of navy agents are not entitled to pensions under the act of the 30th of June, 1834, concerning naval pensions and the navy pension fund.

Navy agents are neither officers, seamen, nor marines; nor are they in the naval service, within the meaning of the law.

ATTORNEY GENERAL'S OFFICE,

April 7, 1837.

SIR: In answer to the question proposed to me in relation to the case of Mrs. Tutt, by your letter of the 2d of February last, I have the honor to inform you that, in my opinion, the widow of a navy agent is not entitled to a pension under the act of the 30th of June, 1834, "concerning naval pensions, and the navy pension fund." The law extends only to the "widows of officers, seamen, and marines, who have died in the naval service since the 1st of January, 1824," &c. Navy agents are neither officers, seamen, nor marines; nor are they in the naval service, within the meaning of the law. The

Pensions to Children of Navy Officers, &c.

case mentioned by Mrs. Tutt, of a pension granted to the widow of a *porter* at the navy-yard at Portsmouth, is explained by the fact stated in your letter, viz: that the individual referred to, though acting as a *porter* at the time of his death, was yet entered and borne on the books as a *seaman*. It was this latter circumstance, and this only, which entitled his widow to a pension.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

PENSIONS TO CHILDREN OF NAVY OFFICERS, &c.

Under the act of 3d March, 1837, the daughter of a deceased sailingmaster, who was paid a pension under the act of 3d March, 1817, until she was sixteen years old, is now entitled to five years' additional pension, notwithstanding she is now over the age of twenty-one years.

ATTORNEY GENERAL'S OFFICE,

April 10, 1837.

SIR: It appears from your letter of the 30th ultimo, that Miss Catharine A. Grennell, daughter of S. H. Grennell, sailingmaster, was paid a pension under the act of the 3d of March, 1817, until she arrived at the age of sixteen years; that she is now more than twenty-one years of age; and claims five years' additional pension, so as to make the term of twenty-one years, supposed to be authorized by the act of 3d March, 1837, "for the more equitable administration of the navy pension fund."

On this claim you ask my opinion. The act of the 3d of March, 1837, was passed for the purpose of securing a more uniform and equal distribution of the navy pension fund. It introduces several new principles; and, among others, establishes as an equitable rule, that where a pension is granted to the *children*, it ought to continue until they attain the age of twenty-one years. As the act is not only prospective, but retrospective in its operation, I think it equitable in itself, and fully warranted by the liberal construction which should be given to such a law, to pay to those children, whose pensions expired under former laws at an earlier age than twenty-one,

Commencement of the Increased Pay of Surgeons.

the half pay for the balance. I am accordingly of opinion that the claim of Miss Grennell is authorized by the late act.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

COMMENCEMENT OF THE INCREASED PAY OF SURGEONS.

The date of the written acknowledgment of the receipt of the order expressing a readiness to obey it, where such written acknowledgment is transmitted by the surgeon, is the day from which the increased pay under the act of 3d March, 1835, is to commence.

ATTORNEY GENERAL'S OFFICE,

April 10, 1837.

SIR: I have duly considered the question proposed in the case of Surgeon Dillard, and referred to me by your letter of the 7th of January last.

It seems to me that the construction given in the accounting offices to the terms "from the date of their acceptance of such orders," so particularly used in the act of the 3d of March, 1835, in connexion with the pay of surgeons, is directly repugnant to the plain intent of Congress. The "*acceptance*" of a thing, in ordinary language, is the receiving of it with approbation, consent, or readiness. When the word is applied to an *order* addressed by the department to a surgeon, it obviously means the receiving of the order with a consent and readiness to obey it. It is agreeable to military and naval usage for an officer who receives an order to acknowledge the receipt of it, and to state his readiness and determination to obey it. Such an acknowledgment is not necessary to give validity to the order, but is respectful to the superior authority, and useful for the sake of information. It becomes necessary where the officer receiving the order is, for any reason, unable or unwilling to obey it. Congress, being aware of this usage, and recognising its propriety, expressly declare that the pay of the surgeons when under orders shall commence from "*the date of their acceptance of such orders.*" The date of the written acknowledgment of the receipt of the order expressing a readiness to obey it, where such written acknowledgment is transmitted by the surgeon, is therefore the day, by the explicit

Rights of Representatives to Unclaimed Pensions.

terms of this enactment, from which the increased pay is to commence. It is, however, proper to add, that should the surgeon, after such a communication, make any unreasonable delay in proceeding to obey the order, the increased pay may with propriety be withheld for the period of such delay; because that delay will be inconsistent with the allegation of readiness to obey the order, which, as already suggested, is necessary to constitute an *acceptance* of it.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

RIGHTS OF REPRESENTATIVES TO UNCLAIMED PENSIONS.

Where the widow of an officer of the navy died before the passage of the act of 1837, her representatives can take nothing by the act, as no right to a pension vested in her.

ATTORNEY GENERAL'S OFFICE,

April 11, 1837.

SIR: In your letter of the 29th ultimo you state the following case:

"The widow of Captain Alexander Murray, of the United States navy, survived him several years, and died his widow, without having received a pension on account of his death. The legal representative of Mrs. Murray now claims the pension for the period she remained a widow, under the act of 3d of March, 1837." On this claim you ask my opinion.

In reply, I have the honor to inform you, that, as Mrs. Murray died before the passage of the act under which the claim is made, I am of opinion no right to any of the benefits granted by that law was vested in her, to be passed to her representative. In similar cases arising under the general pension law of the 4th of July, 1836, I had occasion to adopt this principle; and, though many considerations may well be urged in favor of extending the law so as to reach these cases, yet it is only to Congress that they can properly be addressed.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Pensions claimed by Mrs. Susan Decatur.

PENSIONS TO WIDOWS AND CHILDREN.

Widows of officers, seamen, or marines, who remarried before the passage of the act of 3d March, 1837, are not entitled to pensions under that act, but their children are.

ATTORNEY GENERAL'S OFFICE,

April 11, 1837.

SIR: In reply to the questions proposed to me by your letter of the 15th ult., in the case of the late widow and of the children of Alexander Fisher, I have the honor to state, that, in accordance with the opinion already expressed in the case of the widow and children of Purser Timberlake, the widow of Mr. Fisher, having intermarried, is *not*, and the children *are*, entitled to the pension granted by the act of the 3d March 1837.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

PENSIONS CLAIMED BY MRS. SUSAN DECATUR.

As there was a joint resolution passed for the relief of Mrs. Decatur on the same day of the passage of the act for the more equitable administration of the navy pension fund, she must elect under which she will take, for but one pension can be allowed her.

ATTORNEY GENERAL'S OFFICE,

April 11, 1837.

SIR: I have had the honor to receive your letter of the 15th ultimo, relative to the case of Mrs. Susan Decatur.

It is assumed in your statement of the case, that Mrs. Decatur would be entitled to the pension granted by the act of the 3d ultimo, "for the more equitable administration of the navy pension fund," were it not for the doubt created by the passage, on the same day, of the joint resolution for her special benefit. And on these two laws, you inquire whether she is entitled under the resolution, or under the act, or under both?

This case differs from that of Mrs. Perry, referred to in the note of Mrs. Decatur, accompanying your letter, inasmuch as the law under which Mrs. Perry ultimately obtained her pen-

Pensions claimed by Son and Granddaughter of Com. Barron.

sion was in existence at the time of his death; at which time she was also entitled (although not then aware of the fact) to its benefits. I held, in her case, that the law granting her *annuity* (for such it was called) could not deprive her of a pension given by a pre-existing law; and that, as Congress were presumed to be acquainted with the laws in force, the legal intentment must be that the annuity was designed as an additional provision, and, consequently, that she was entitled to both.

After maturely considering the history of the general and special provisions on which the present case depends, I am of opinion that but *one* pension can be allowed; but if the general provision includes the case of Mrs. Decatur, then I am of opinion she is entitled to take under that provision, or under the joint resolution, at her election.

I am, sir, &c., &c ,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

**PENSIONS CLAIMED BY SON AND GRANDDAUGHTER OF
COMMODORE BARRON**

Grandchildren are not included in the law for the more equitable administration of the navy pension fund.

But the children (the widow being dead) take in equal moieties from the death of the father until the death of one of them, or until they arrive at the age of twenty-one years. Where, as in this case, one of the children died before the other arrived at the age of twenty-one, the latter is entitled to the full pension from her death until that time.

ATTORNEY GENERAL'S OFFICE,

April 12, 1837.

SIR: It appears from the papers enclosed in your letter of the 8th instant, that Commodore Samuel Barron died in the year 1810, leaving a widow and two children (a son and daughter) of tender age; that his widow died in 1818; that the son, Lieutenant Barron, of the navy, is yet living, and is now 28 years of age; that the daughter died in 1821, being then 23 years of age, leaving one child, (a daughter,) who is yet living, and now the wife of G. W. Camp; and that the son and

Pensions to Orphan Children of Soldiers.

granddaughter now claim a pension under the act of the 3d of March last, "for the more equitable administration of the navy pension fund." On the validity of this claim you ask my opinion.

In accordance with the decisions already made on this law, I am of opinion that the son of Commodore Barron will be entitled to one-half of the pension given by it, from his father's death to the death of his sister; and to the whole pension, from that time to the time when he arrived at the age of 21 years; provided (as I presume was the fact) no pension was received by his mother. On the other hand, it is evident that Mrs. Camp, the granddaughter, is not entitled by the terms of the law; because the pension, in the event of there being no widow, is confined to the *children* of the decedent; and, when received by them, is to cease on their death, or on their attaining the age of 21 years. Grandchildren are thus plainly excluded. According to the opinion expressed by me in the case of the personal representatives of Mrs. Murray, the widow and daughter of Commodore Barron, having each died before the passage of the law, had no right which they could transmit to their personal representatives; and consequently Mrs. Camp's claim is, in this respect, also invalid.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

PENSIONS TO ORPHAN CHILDREN OF SOLDIERS.

Where the soldier shall have died before the 7th of June, 1832, and subsequent to the 4th of March, 1831, leaving a widow who demised before the former date, the children of the *soldier*, not of the widow, are entitled to the pension.

ATTORNEY GENERAL'S OFFICE,

April 13, 1837.

SIR: In the memorandum of the honorable Mr. Hubbard, enclosed in your letter of the 24th ultimo, the following case is stated: "In case a soldier dies before the 7th of June, 1832, and after the 4th of March, 1831, and leaves a widow, and she dies also before the 7th of June, 1832, are his children entitled

Pensions to Widows and Orphans.

to the pension from March, 1831, to the day of his death; or does the pension go to the children of the widow?"

In answer to your request for my opinion on this subject, I have the honor to inform you that, in my opinion, the children of the *soldier*, and not the children of the widow, are entitled to the pension from the 4th of March, 1831, to the time of his death.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PENSIONS TO WIDOWS AND ORPHANS.

The third section of the act of the 4th of July, 1836, granting half-pay to widows or orphans, where their husbands and fathers have died of wounds received in the military service of the United States, does not provide for widows of officers and soldiers who have died since the passage of the act.

It does extend to the widows of officers who were living at the time when the act of June 7, 1832, was passed.

The right of a widow to a pension under the act is a vested interest that is not defeated by her neglect to apply for it; and it goes to her personal representatives at her death, there being no special provision giving it a different direction.

Where the husband received a pension at his death, the pension of the widow under the act of the 4th of July, 1836, commences only from that date.

The agent for paying pensions is not the accounting officer intended by the 4th section of the act.

OFFICE OF THE ATTORNEY GENERAL,

April 13, 1837.

SIR: I proceed to state my opinion on the several questions arising on the act of the 4th of July, 1836, "granting half-pay to widows or orphans where their husbands and fathers have died of wounds received in the military service of the United States, in certain cases, and for other purposes," submitted in the communication of the Commissioner of Pensions, referred to me by your letter of the 24th ultimo.

"1. Whether the 3d section provides for the widows of officers and soldiers who have died since the 4th of July last?"

In my opinion, it does not. The words used in the 3d section, "if any person who, &c., *have died*," in their grammatical sense do not extend to future cases, and it must be presumed

Pensions to Widows and Orphans

that Congress intended to use them appropriately; especially when it is perceived that in the first section the second future "*shall have died*" is used—evidently with intent to embrace not only past cases, but those which might afterwards occur.

"2. Whether it extends to the widows of officers who were living at the time when the act of June 7th, 1832, passed?"

With some hesitation, I think it most agreeable to the general spirit of this law to answer this question in the affirmative. The main enacting part of the section is broad enough to embrace all persons who served in the manner specified, who died *before* the passing of the act; and though the concluding words "*if living* at the time it [the law of 1832] *was passed*" are calculated to excite doubts as to the real intent of Congress, yet they are not, perhaps, sufficiently strong to limit the comprehensive language of the former part of the provision.

"3. Can the children of a widow, who was living on the 4th of July last, and was entitled to the benefits of the 3d section of the act, now draw the amount due up to the day of her death, although she failed to apply?"

According to several opinions heretofore given in this office, especially in navy pension cases, the right of the widow under the act is to be regarded as a vested interest accruing on the passage of the law, and not defeated by the omission to apply for it; and it goes, as such, on her death, to her personal representative: there being no special provision in the law giving it a different direction.

4. I am of opinion that, in all cases where the husband was in the receipt of a pension under any of the revolutionary pension acts, until the time of his death, the pension of the widow, under the act of the 4th of July, 1836, can only commence from the date of her husband's death. This is evidently the general principle of the law; and by this construction there will be no occasion to make deductions, nor will any of the difficulties arise which have been suggested by the Commissioner.

5. I think the agent for paying pensions is not the "accounting officer" intended by the 4th section of the act, which evidently refers to some officer of the Treasury Department. But the section was evidently passed under an entire misap-

Paramount Right of Indian Reserves.

prehension of the mode in which the business is transacted. No "*warrant*" is issued, nor indeed can one be issued, to the attorney of the pensioner. The only "*warrant*" employed in the transaction, as I understand, is the general one for such sum as is deemed necessary to be placed in the hands of the pension agent; the pensioners, after receiving their certificates, are inscribed on the pension roll, and, being so inscribed, on proof of the life and identity, are paid personally, or through their attorneys, without any special warrant or other treasury order. The section, in its present form, is therefore wholly nugatory; but the Secretary of War is empowered to prescribe regulations, and the one stated by the Commissioner effects the object which Congress had in view. It does not seem to me to require any alteration.

6. The construction given to the 3d section, in respect to widows who have married since the death of the husband performing the service, as stated by the Commissioner, was, in my judgment, the correct one; but, by the explanatory act of the 3d ultimo, the benefits of the provision are extended to such persons.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PARAMOUNT RIGHT OF INDIAN RESERVEES.

The Indian reservees under a treaty have a right paramount and superior to any grant of sections to States.

Until their title shall be fully extinguished, the grants of Congress cannot operate.

ATTORNEY GENERAL'S OFFICE,

April 15, 1837.

SIR: In your letter of the 5th instant, you ask my opinion on the following question, proposed by the Commissioner of Indian Affairs:

"Does the first proposition in the 7th section of the act of April 30th, 1802, 'to enable the people of the eastern division of the Northwestern Territory to form a constitution and State government,' vest in a township a title to the 16th section, for school purposes, superior to that of a reservee under a treaty, by which the Indian title to the land was extinguished?"

Right of Occupancy of the Ottawas and Chippewas.

I have the honor to inform you, in reply, that, according to the opinion given by me on the 31st of March, 1836, in the case of the Choctaw treaty, (to which I beg leave to refer,) the above question must be answered in the *negative*.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. J. R. POINSETT,

Secretary of War.

RIGHT OF OCCUPANCY OF THE OTTAWAS AND CHIPPEWAS.

The stipulation contained in the treaty of March, 1836, with the Ottawa and Chippewa Indians, for the right of hunting on the land ceded, and the other usual privileges of occupancy, until the land should be required for settlement, reserved its use for all the purposes of Indian occupancy as the same then existed.

ATTORNEY GENERAL'S OFFICE,

April 20, 1837.

SIR: In answer to the questions proposed in the letter of the Commissioner of Indian Affairs, and referred to me by your communication of the 23d ultimo, I have the honor to inform you that, in my opinion, the thirteenth article of the treaty of March, 1836, with the Ottawa and Chippewa Indians, by which "the Indians stipulate for the right of *hunting* on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement," must be regarded as reserving the *use* of the ceded lands for all the purposes of Indian occupancy, as it existed prior to the treaty, until such lands shall have been actually disposed of to individuals by the United States. Such disposition may be made by sale under the general laws, or by special grants, or in any other way that Congress may direct; and whenever an actual disposition of any particular tract shall be made, the usufructuary right of the Indians will cease as to such tract. In the mean time, however, that right cannot lawfully be interrupted by the government; still less by any citizen of the United States.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. J. R. POINSETT,

Secretary of War.

Claims under the Treaty with the Cherokees.

CLAIMS UNDER THE TREATY WITH THE CHEROKEES.

Claims under the treaty must be for services of a lawful nature, and performed at the instance and request of the acting authorities of the nation.

The sum of sixty thousand dollars constitutes the whole amount which can be paid by the United States for the claims of citizens for services rendered the Cherokee nation by the treaty of 1836.

ATTORNEY GENERAL'S OFFICE,

April 20, 1837.

SIR: In the letter of Messrs. Lumpkin and Kennedy, commissioners under the treaty of 1836 with the Cherokees, enclosed to me in your communication of the 23d ultimo, the following questions are stated, on which you ask my opinion:

1. As to the limits imposed by the treaty, on the gross amount to which claims for professional services rendered to the Cherokees by citizens of the United States may be allowed?

2. What constitutes a just claim under the treaty for such services? and

3. To constitute such a claim, is it necessary that the claimant should have been employed by the authority of the nation?

I. In answer to the first of these questions, I have the honor to inform you, that, after maturely considering the statement of Mr. Schermerhorn, one of the commissioners who negotiated the treaty, and the arguments of Mr. Hansell, in behalf of himself and the other claimants, I am of opinion that the sum of sixty thousand dollars constitutes the whole amount which can be paid by the United States, under this treaty, for the claims of citizens of the United States for services rendered to the Cherokee nation; and that, if this sum is insufficient to meet the whole amount of the just claims of such persons, they must resort, for the balances which may be due to them respectively, to the Cherokee nation. The tenth article of the treaty provides as follows: "The United States also agree and stipulate to pay the just debts and claims against the Cherokee nation, held by the citizens of the same, and also the just claims of citizens of the United States, for services rendered to the nation; and the sum of sixty thousand dollars is appropriated for this purpose: but no claims against individual persons of the nation shall be allowed and paid by the nation." The

Claims under the Treaty with the Cherokees.

appropriation of the sum of \$60,000, in the above clause, is expressly and solemnly made; and such a construction must be given to the clause, and to the whole treaty, as to give some reasonable effect to this appropriation. But it is impossible to give any such effect to it, except by treating it as the limit to which the United States were to go in paying the claims embraced in it. If the full amount of the just claims referred to, even though they should exceed \$60,000, is yet to be paid, the appropriation of that sum was worse than an idle waste of words; it was calculated to produce ambiguity and dispute, where it was perfectly easy to avoid both by simply omitting the specific appropriation.

As we have no authority to reject this appropriation, the only remaining question under this head is as to the claims embraced in it. Here, it must be admitted, there is a serious ambiguity in the language. The appropriation admits of two constructions: it may apply to *all* the debts and claims spoken of in the clause—that is to say, the just debts and claims against the Cherokee nation held by citizens of that nation, as well as the just claims of citizens of the United States for services rendered. But, if this had been intended, the more accurate and natural expression would have been, “and the sum of \$60,000 is appropriated for these purposes;” because, the just claims of the citizens of the United States are enumerated in the clause as a second class of cases, and the strict grammatical construction of the phrase “for this purpose,” confines it to this latter class. I construe the clause as though the phraseology had been, “and also the just claims of citizens of the United States for services rendered to the nation, for which purpose the sum of \$60,000 is appropriated.” This, I think, is the precise grammatical effect of the language used; and, in a case of doubt, the grammatical construction should be preferred, unless plainly repugnant to the probable intent. In the present case, the grammatical construction will produce no injustice; whereas, the extension of the appropriation to both classes of cases enumerated in the clause might do great injustice. It is, moreover, in accordance with the statement of Mr. Schermerhorn, who informs us that the sum of \$60,000 was named in the first draught of the article, exclusively with

Consent Requisite to a Sale of Indian Reserves.

reference to the last description of claims. It is true this gentleman also thinks that, although this peculiar appropriation was intended to meet the claims of our citizens for services rendered to the Cherokee nation, it does not necessarily limit the amount to be allowed and paid to \$60,000, in the aggregate, provided the just claims shall actually exceed that sum: an opinion from which, as already stated, I wholly dissent. But, the information given by him as to the origin of the appropriation may well be resorted to, where the language is obscure, for the purpose of settling the construction.

II and III. In answer to the second and third questions, I can only observe that, in my opinion, the claim, to be a *just* one under the treaty, must be for services of a lawful nature, performed at the instance and request of the acting authorities of the nation.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

CONSENT REQUISITE TO A SALE OF INDIAN RESERVES.

A general approval endorsed on an Indian's petition for authority to alienate his reserve, under the treaty with the Ottowas, &c., of the 29th August, 1821, is a valid consent—such having in 1822 been the mode adopted by the President for the exercise of his supervision.

ATTORNEY GENERAL'S OFFICE,

April 22, 1837.

SIR: I have attentively considered the case of John Thorn, as stated by the Commissioner of the General Land Office, in the communication enclosed in your letter of the 9th ultimo.

It appears to me that, under the circumstances stated by the Commissioner, the conveyance to McKinstry, and consequently that from McKinstry to Thorn, ought to be supported.

Many of the Indian treaties are so framed as to preclude the execution of a conveyance by the Indian, even with the President's consent, until after the designation of the particular tract to which the grantor is entitled. This, however, is not the

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case with the treaty of the 29th of August, 1821, with the Ottawas, Chippewas, and Pottawatomies; the tracts to be granted under that treaty being located with sufficient precision in the treaty itself, as to enable the parties to judge of their situation and value; and there being no restraint on the power of alienating the interest acquired by the parties, except that it be done with the consent of the President.

Whether it was expedient to give such permission before the actual designation of the tract to which Chaudonai and Daze were entitled, or not, was a question of discretion, to be settled exclusively by the President.

The petition to President Monroe, on the 8th of August, 1822, by these Indians, is explicitly for permission to sell and convey in fee simple one of the two sections of land granted to Chaudonai, adjoining to the tract granted to J. B. La Leme, and also the section of land granted to Daze. The President, after causing the substance of the petition to be endorsed thereon, subjoins to such endorsement the words, "Approved—James Monroe."

It appears from the Commissioner's letter, that at that time no formal regulation had been prescribed by the President in relation to the manner of conveying Indian reservations; and even were it otherwise, this express certificate of approbation by the President would probably be an adequate permission, within the meaning of the treaty; because, the whole matter being left to the President, he would at all times possess the power to dispense with his own regulations.

It is not now usual to grant a general permission to sell, but the permission given by President Monroe was no doubt in conformity with the practice then observed in such cases; and though certainly not well adapted to protect the interests of the Indian grantor, we cannot, for that reason, deny its validity.

I have the honor to be, with great respect, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY,
Secretary of the Treasury.

Pre-emptions.

PRE-EMPTIONS.

A failure to pay for a pre-emption before a public sale of the lands in which it is situated, forfeits the right, and, consequently, the right to select eighty acres elsewhere; it may be saved, however, by a tender of payment in due time.

A tender for the original tract and for the tracts selected, with a condition that the first shall not be received without the latter, is a good tender, provided all the tracts are liable to be selected; otherwise, not.

A pre-emptor may float a tract returned as a regular half-quarter section, and two pre-emptors may float tracts that do not in the aggregate exceed 160 acres. He may select subdivisions of fractions where the land district contains no regular half-quarters, but, in such cases, should be confined to those containing the least excess over eighty acres.

Where the district contains regular half-quarters, the two floats cannot take fractions which, united, amount to over 160 acres.

Designating a tract before the coming in of a plat, so as to enable the proper officer to locate, is sufficient. Error in description is not fatal, if the tract be identified.

ATTORNEY GENERAL'S OFFICE,
April 27, 1837.

SIR: In the case of Brown, Reynolds, and others, brought before you by appeal from the decision of the Commissioner of the General Land Office, and referred to me by your letter of the 3d instant, it appears that Messrs. Brown and Reynolds had originally an acknowledged right under the pre-emption act of May 29, 1830, to the northwest quarter of section 33, in virtue of joint cultivation and possession, and, in consequence thereof, each had also a right to *floats* of eighty acres elsewhere; that under an instruction from the General Land Office, rendered necessary by the absence of the plats of survey, their claims as well to the tract cultivated as to the tracts designated for the accruing *floats*, were registered; that it was afterwards discovered that the latter tracts exceeded each the quantity of eighty acres, for which reason the land officers refused to permit the entries; that Messrs. Brown and Reynolds refused to pay for the tract cultivated, unless their claims to the tracts designated as *floats* were recognised, and payment received for them at the same time, but offered to make payment for all; that matters stood in this condition until the tract cultivated was proclaimed for sale, and not having been purchased and paid for by Brown and Reynolds, or sold at public sale, it was subsequently sold at private sale to one Lewis; and that in the

Pre-emption.

mean time the tracts claimed as *floats* were also awarded, under the pre-emption law of 1834, to other persons; but no patents have yet issued. In this state of the case you propose to me the following questions:

“1. Messrs. Brown and Reynolds having failed to make payment on the tract occupied and cultivated, and from which their floating rights were derived before the commencement of the public sale, as required by the act of May, 1830, and the instructions of the Land Office; or to make any tender of payment prior to that period, unless upon the condition that the tracts claimed to be *floats* should be awarded to them and paid at the same time: does it not follow, as a necessary consequence of such neglect and refusal, that they have forfeited their right to all?”

“2. If a timely tender for the whole be regarded as a legal tender for a part, and it is held that their rights are in no way impaired by the failure to make payment for the land to which the ‘*floats*’ were appurtenant: is not their claim to the tracts designated as *floats* illegal and void, for the reasons assigned by the district land officers in their letter of the 26th October, 1836?”

In answer to these questions I have the honor to state the following propositions, as the result of my reflections on the subject:

1. A failure to make the proof and payment required for the tract occupied and cultivated, and from which the *floating* rights are derived, before the day appointed for the commencement of the sales of the public land including such tract, will, as a general rule, involve a forfeiture of all the privileges held out by the act, not only in respect to the tract occupied and cultivated, but in respect to those tracts which might otherwise have been claimed under the *floating* rights. This is the necessary effect of the fourth section of the act of May 29, 1830, which provides that none of the provisions of the act shall “be available to any person or persons who [shall] fail to make the proof and payment required before the day appointed for the commencement of the sales of lands including the tract or tracts on which the right of pre-emption is claimed.”

2. A tender of payment made in due time, and of the requi-

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site amount, is sufficient, in ordinary cases between individuals, to save the rights of the party making the tender; and, in cases of executory agreements, will entitle him, in a court of equity, to a specific performance of the contract.

The same principle, in my judgment, should be applied by the General Land Office to cases arising under the land laws.

3. A tender of payment for the tract occupied and cultivated, and for certain other tracts claimed as accruing *floats*, though coupled with the condition that the sum applicable to the primary tract shall not be received by the land officers unless the claimants are also allowed to purchase the tracts designated by them under their *floating* rights, and with a refusal to pay for the tract occupied and cultivated, unless the others can also be purchased by the parties, ought, in my opinion, to save the rights of the parties making the tender to *all* the tracts referred to; provided it shall appear that the tracts designated under the *floating* rights were liable to be purchased under such rights, at the time when the tender was made. But I think that parties making a tender in this way incur the duty of showing that the tracts claimed as accruing floats were really such as they had a legal right to purchase under the law; and that if it turns out that they had no right to claim such tracts, the whole tender will be vitiated. In other words, the party making a tender in this form does it at his own peril; and if it proves to be bad in part, it must, as a consequence of the character he has given it, be bad for the whole.

The above principles, when applied to the case before me, would seem to place the claim of Messrs. Brown and Reynolds to the tracts designated by them as accruing floats, on the same footing on which it stood when they made the tender of payment; and to reduce the whole case to the question whether or not they were at that time entitled to select the tracts so designated by virtue of their floating rights.

The district land officers think their claim to those tracts was illegal and void, for certain reasons specified in their letter to the Commissioner; to the sufficiency of which reasons you have called my attention in the second of the above questions.

1. On recurring to that letter, I find that the claims of Messrs. Reynolds and Brown to the tracts designated under their float-

Pre-emptions.

ing rights were rejected by the land officers because the tract selected by each contained more than *eighty* acres; those officers being of opinion that the law on this point was imperative, and that it left with them no discretion to allow such a claim.

The Commissioner of the General Land Office, in his letter of the 7th of September, 1836, makes the following observations on this objection: "From the last survey of this township, it would appear that the tract claimed by Brown may not contain so much as eighty acres; but as the west line of lot A is not continued in the last plat, (the half-mile line, as was done in the former plat,) the contents cannot be correctly ascertained until the surveyor general makes such subdivision.

"It has been decided by this office, as pre-emptors frequently select tracts on which to locate their floats containing less than eighty acres, and are thus deprived of part of the number of acres to which they were entitled under the law, in cases where a claimant selects a half quarter of a section on which to locate his float, which contained a few acres more than the eighty mentioned in the law, to permit such location to be perfected."

Where the tract selected, though it may contain a few more acres than eighty, is yet returned in the surveys as a *half-quarter section*, I have no doubt the pre-emptor should be allowed to purchase it. The first section of the act of May 29, 1830, provides "that the settler or occupant may enter with the register of the land office for the district in which such lands may lie, *by legal subdivisions*, any number of acres not more than one hundred and sixty, or a *quarter section*, to include his improvements;" and although the second section, which relates to cases of joint cultivation, merely says that "in such case the said settlers shall each be entitled to a pre-emption of *eighty acres of land* elsewhere in said land district," and makes no mention of *legal subdivisions* nor of *half quarter sections*, yet, as the two sections are *in pari materia*, there can be no objection to the pre-emptor's taking, under his *floating* right, any tract returned as a *half-quarter section*, (which is a legal subdivision,) even though it may chance to contain a little over eighty acres.

I think, also, that where the tracts designated by the two

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joint pre-emptors, under their *floating* rights, do not together exceed one hundred and sixty acres, they ought to be allowed to purchase them, notwithstanding one of them may contain more than eighty acres—such a case being clearly within the equity of the law. And where the tract contains no regular quarter sections of eighty acres, liable to selection under *floating* rights, the equity of the law may also entitle the pre-emptor to select a fractional division, containing a larger quantity of acres—such a course being necessary to prevent the failure of the privilege. It would seem, however, that in such cases the pre-emptor should conform as nearly as may be to the provisions of the law, and should therefore be confined to fractional divisions containing the least excess over eighty acres.

Where there are regular half quarter sections of eighty acres liable to selections, and the joint pre-emptors choose, under their *floating* rights, to take each a fractional division, it seems to me that they should be confined to tracts which, in the aggregate, do not exceed one hundred and sixty acres. To allow them to purchase more, without necessity, is not only repugnant to the words of the law, but to its spirit and evident design.

How far the foregoing views, should they be adopted by you, may affect the present case, I have not the requisite information to determine.

2. The district land officers object to both the claims, that there are no such tracts represented on the maps as those designated by Messrs. Brown and Reynolds in the abstract.

I do not find in their letter a sufficiently perspicuous statement of the facts to enable me to determine the effect of this objection in this case, and I must therefore confine myself to a statement of the principles which I think applicable to it.

It is sufficient, in my opinion, that the party entitled to a *floating* right should designate the land he claims to purchase under that right, with such certainty as to enable the proper officers to locate it.

An error in the description will not be fatal to his claim, provided the material particulars are so specified as to identify the tract.

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3. Some remarks are made by the land officers in their letter concerning the effect of the new surveys made under the act of the 5th of April, 1832. I am of opinion that those surveys cannot affect this case, because the act is expressly confined to such public lands as might be "offered at private sale," after the first day of May then next, and cannot by any just latitude of construction be carried back to embrace pre-emptioners under the act of 1830.

4. It is objected by the land officers, to the claim of Brown, that the very tract selected by him was also claimed by one Stone, upon an allegation that he had cultivated it; and by one Garner, under a floating right; and that the names of Stone and Garner both preceded the name of Brown on the abstract prepared by the land officers, each name being followed by the designation of the tract claimed by Brown. It does not appear to me that there is any force in this objection. The land officers state that Stone's claim was abandoned in consequence of its being found that his tenements were on an adjoining tract which he elected to take; and Garner did not follow up his claim by an offer to pay in due season.

I believe the material questions of law arising in this complicated case are sufficiently met in the above remarks; and have the honor to remain,

Very respectfully, your obedient servant,

B. F. BUTLER.

The Hon. LEVI WOODBURY,

Secretary of the Treasury.

DAMAGES FOR THE UNLAWFUL DETENTION OF VESSELS.

Where a merchant vessel was detained by the agent of the United States, at Buenos Ayres, and by him sent to the United States, and an act of Congress was subsequently passed directing the actual loss to the owner to be ascertained and paid, and the Fifth Auditor had disallowed a portion of the items claimed—HELD, that the owner is entitled only to the actual loss sustained.—(1 Johnson's Reps., 134; 3 Wheaton's Reps., 246; 9 do., 362; 13 Johnson, 141, 561; 2 Cranch's Reps., 64.)

The loss of the use of a vessel thus detained, during her detention, was the first and most direct consequence of that detention; the damage occasioned thereby is not constructive and consequential, but actual, positive, and real.

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The Auditor may adopt the principle of difference in value, or demurrage, as the standard of his action; adding thereto, in either case, such additional allowances as will meet the actual loss of the party. Where the difference in value is adopted as the standard, interest, and personal and other expenses, are to be added; where demurrage is the standard, all necessary expenses, not relating to the use or management of the vessel, are to be allowed in addition.

This opinion proceeds with instructions to the Auditor, as to proper allowances in case either mode of ascertaining the loss is adopted, and discusses the doctrine of damages.

ATTORNEY GENERAL'S OFFICE,

May 20, 1837.

SIR: I have duly considered the several questions referred to me in the case of Mrs. O'Sullivan, and will now proceed to state my opinion thereon.

The act to provide for the settlement of the claim of Mrs. O'Sullivan, approved July 2, 1836, enacts "that the Secretary of the Treasury be, and he is hereby, authorized and directed to cause the claim of Mary O'Sullivan, widow and executrix of John O'Sullivan, deceased, to be examined by the accounting officers of the Treasury; and that there be allowed and paid to the said Mary O'Sullivan, out of any money in the Treasury not otherwise appropriated, the amount of actual loss which may be shown, to the satisfaction of the Secretary of the Treasury, to have been sustained by the said John O'Sullivan, in consequence of the act of the late John M. Forbes, commercial and political agent of the United States of America at Buenos Ayres, in detaining the vessel of the said John O'Sullivan, in the year 1823, and causing her to be sent to the United States."

[Here follows the account as passed by the Auditor, which is omitted.]

In this state of the case, the Auditor requests that the following questions may be submitted for my opinion. I copy them as stated by the Auditor, with his observations thereon:

"1. Is the claimant entitled, within the terms and intention of the act, to compensation for the deprivation of the use of the vessel during her detention?"—"In the opinion of the Auditor, concurred in by the Secretary of the Treasury, that is a constructive and consequential, and not an actual loss."

"2. If she be entitled to such compensation, is demurrage, at a certain estimated per diem rate, as customary among mer-

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chants, the proper mode for its allowance?"—"In my opinion, this mode might be adopted, but as an alternative and substitute for that already adopted, and would require, if adopted, the deduction of all the allowances already made; demurrage being allowed usually among merchants, with the view to cover all kinds of losses. The claimant, on the contrary, claims that, if the demurrage be allowed, a portion only of the allowances already made (to wit, \$7,883 14) ought to be deducted; and that the allowance of \$5,420 for depreciation of value in the vessel, from the causes referred to in her argument, and the allowance of \$548 08 for the cost of the marshal's sale, ought not to be deducted."

"3. To which of the three points of time ought the detention and demurrage to be considered as extending: the date of the marshal's sale—21st January, 1824; the date of the delivery of the register—12th February, 1824; or the date of the completion of the repairs, when the vessel was ready for sea—the 5th May, 1824?

"4. Is the claimant entitled to compensation for the personal expenses of Mr. O'Sullivan, as referred to in her statement, and in the deposition of Mr. Smith, of July 29, 1836, or not?"—"In my opinion, the claim is inadmissible."

The act of Congress for the settlement of the present claim provides, substantially, the same rule of compensation as that adopted by the courts in cases of admiralty jurisdiction and of marine torts, where the act complained of is not accompanied by circumstances entitling the party to speculative or vindictive damages. In all such cases the owner is only allowed to recover for the *actual loss* sustained by him. It is only when the illegal seizure or detention was prompted by corrupt motives, or was accompanied by gross misconduct, that damages beyond a fair indemnification for actual losses are allowed to be given by the jury, or, in admiralty cases, awarded by the court. In cases of this description, the loss of expected profits, where a voyage is broken up, and other contingent and speculative losses, are taken into the account; and sometimes smart-money, or vindictive damages, are also allowed.

The seizure of a vessel, or of a vessel and cargo, by a collector or other officer, in good faith, and for an alleged breach of

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the laws which has not actually occurred, belongs to the first of these classes; the damages of the owner being always limited in such cases to the actual loss sustained by him in consequence of the illegal seizure or detention of his vessel. As it is the practice of Congress to assume the payment of the damages so recovered, it may well be presumed that the distinction between this class of cases, and those in which speculative or vindictive damages are allowed, was kept in view in the enactment of the present law. The adjudged cases, in which recoveries have been had against officers acting in good faith, and in which Congress afterwards made provision for indemnifying the officer, may, therefore, with great propriety, be referred to for the purpose of ascertaining the manner in which the rule is carried into effect. The following are cases of this description:

Woodham vs. Gelston, (1 Johns. Reps. 134.) The ship of the plaintiff had been seized by order of the defendant, as collector for the port of New York, for an alleged breach of the revenue laws, but, as it subsequently appeared, without sufficient cause. The ship remained in the custody of the marshal between ten and eleven months, when she was restored to the plaintiff, and eight days afterwards sold by auction to the highest bidder, for a price much less than that for which she could have been sold at the time of her seizure. It was held by the supreme court of the State of New York, that the difference between those sums, together with the *actual expenses* incurred, and *interest* on the amount, constituted a just and proper measure of damages. In this case the vessel, at the time of her seizure, was lying in the port to which she belonged; and the owner intended to sell her, and not to send her on a voyage. It was also proved that vessels had fallen, during the detention of the plaintiff's ship, one-third in value.

In the case of *Hoyt vs. Gelston & Schenck*, (13 Johns. Reps., 141, 561; and 3 Wheaton's Reps., 246,) the ship *American Eagle*, belonging to the plaintiff, had been illegally, but without any malice or other improper motive, seized by the defendants, the collector and surveyor of the port of New York. Restitution being decreed by the district court, the owner afterwards brought an action of trespass in the supreme court of New York,

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and recovered the difference between the value of the vessel at the time of her seizure, and the appraised value at the time of her restoration, with interest, and with a considerable additional sum, the particulars of which do not appear in the reports of the case.

In the case of the *Charming Betsey*, (2 Cranch's Reps., 64,) captured by Commodore Murray, and, after the sale of cargo in the island of Martinique, sent into the United States, but ordered to be restored to the claimants, on account of the illegality of the seizure, the Supreme Court of the United States directed the actual prime cost of the vessel and cargo, with interest thereon, including the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, to be adopted as the standard of damages.

In the case of the *Apollon*, (9 Wheaton's Reps., 362,) the collector of St. Mary's had seized the vessel and cargo, in good faith, for a supposed breach of our revenue laws; but none having actually taken place, a decree of restitution and for damages was pronounced. An appeal was taken from the district to the circuit court, and from the latter to the Supreme Court of the United States; by which the following items of damages were allowed:

1. Demurrage of the ship from the time of seizure to her restoration.
2. The difference between the amount of sales of the cargo (which was sold under a perishable monition) and the net proceeds of the sales restored to the claimants.
3. Traveling expenses of the second captain to Savannah, on the business of the ship.
4. Necessary counsel fees.

In each of the foregoing cases, Congress passed acts indemnifying the officer to the full extent of the recovery against him. (Laws of the United States, vol. 4, p. 91; vol. 3, p. 367; vol. 6, p. 282; vol. 7, p. 259.)

It will be seen, from the cases cited, that the mode adopted by the Auditor in the present instance is usually adopted by the courts where the property has been destroyed or injured in value by the seizure; and that, in cases of detention merely, demurrage is considered as the most appropriate method of estimating the loss. In the case of *Woodham vs. Gelston*, the

Damages for the Unlawful Detention of Vessels

plaintiff's counsel objected to the demurrage, and insisted on the other mode of compensation, (which was allowed by the court,) on the ground that, as the ship had fallen in value, demurrage would not cover the whole loss. On the other hand, in the case of the *Apollon*, where the detention was but short, the Supreme Court of the United States considered demurrage (in that case objected to by both parties) as the true mode of liquidating the loss. Mr. Justice Story, in delivering the opinion of the court, uses the following language:

“The principal arguments against this decree have been directed to the allowance of demurrage as a just measure of compensation. The Attorney General contends that it ought to be disallowed, as far too high a compensation; the counsel for the libellant, as an allowance unreasonably low. This court, on various occasions, has expressed its decided opinion that the probable profits of a voyage, either upon the ship or cargo, cannot furnish any just basis for the computation of damages in cases of marine tort. This basis has accordingly been, in every instance, rejected. Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with interest upon the amount from the time of the trespass. Where there has been a partial injury only, that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted as a fair recompense; and the addition of ten per cent. has been sometimes made where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination. Such, it is believed, have been the rules most generally adopted in practice in cases which did not call for aggravated or vindictive damages. And it may be truly said, that, if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation upon principles of public policy.

“But it is now said that demurrage always arises *ex con-*

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tractu, and, therefore, cannot furnish any rule of compensation in cases of tort. The practice in courts of admiralty has certainly been otherwise; and the very cases cited at the bar show that no distinction has been taken, as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that, in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation in cases *ex delicto*. What fairer rule can be adopted than that which founds itself upon mercantile usage as to indemnity, and fixes a recompense upon the deliberate consideration of all the circumstances attending the usual earnings and expenditures in common voyages? It appears to us that an allowance by way of demurrage is the true measure of damages in all cases of mere detention, for that allowance has reference to the ship's expenses, wear and tear, and common employment. Every other mode of adjusting compensation would be merely speculative, and liable to the greatest uncertainties."

It will also be seen that, whichever of these modes may be adopted, the courts uniformly sanction certain additional allowances, varying according to the nature and circumstances of the case, and intended to meet the actual loss of the party. Thus, where the difference in value is adopted as the standard, interest and personal and other expenses are added; where demurrage is the standard, all necessary expenses not relating to the use or management of the vessel are allowed. In accordance with this practice, if the mode adopted by the Auditor be adhered to, the following additional allowances should be made:

1. Interest on the prime cost of the vessel, from the time of her seizure to the time when she was fully restored to the possession of the owner by the delivery of the new register—that is to say, the 12th of February, 1824. It is obvious that the difference in the *value* of the vessel is not the whole loss sustained. The beneficial *use* of the vessel is also lost to the party during the whole period of the detention; and, for this

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loss, interest on her prime value is but the lowest rate of indemnification.

2. Seamen's wages from Buenos Ayres to New York, as appears by the account of the disposition of the proceeds of the sale in New York, \$473 62. This item stands on the same footing as the expenses at Buenos Ayres and the cost of the sale, both of which were allowed by the Auditor; and I presume was omitted from inadvertence, the Auditor's attention being particularly called to it.

3. Personal expenses of Mr. O'Sullivan while waiting at Cadiz, returning home, and seeking the recovery of his vessel. Expenses of this nature are usually allowed in the reported cases, and in the present instance ought, in my judgment, to be allowed. It is true that Mr. O'Sullivan's prior engagements required his presence in Cadiz; and the expenses of his stay there were, in the first instance, occasioned by those arrangements, and not by the act of Mr. Forbes; but, then, the interference of Mr. Forbes entirely frustrated those arrangements, and rendered those expenses useless. The amount thus expended was, therefore, it seems to me, an *actual loss* sustained *in consequence* of the acts of Mr. Forbes. Mr. O'Sullivan's expenses in returning to New York and seeking the recovery of his vessel stand on still stronger ground; they were exclusively occasioned by the acts of Mr. Forbes, and are, therefore, within the express provisions of the act of Congress. The allowance of them is also justified by all the cases.

4. It is stated by the supercargo, in one of his affidavits, that a cargo of hides had been purchased for Mr. O'Sullivan at Buenos Ayres, for the purpose of lading the vessel on her voyage to Cadiz; and that, in consequence of the seizure and detention of the vessel by Mr. Forbes, the agent of Mr. O'Sullivan was obliged to sell those hides at Buenos Ayres at a loss. The loss sustained on this resale, if satisfactorily proved, would evidently constitute an actual loss which ought to be refunded; and, on a conference with the Auditor, I find he entertains the same opinion, but felt himself obliged to reject the item for want of sufficient proof.

I think it clear, for the reasons just stated, that the account already settled, if adhered to in principle, should be corrected

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in the particulars above mentioned; and, under the particular circumstances of the case, I am of opinion that demurrage, according to the usual commercial rate for vessels of the size of the *Dick*, and employed in the trade to which she was destined, is the more appropriate mode of compensation for that part of the loss which would be covered by demurrage. The vessel was actually engaged in a voyage which was entirely broken up; and, for the reasons so clearly stated by Judge Story in the case of the *Apollon*, demurrage seems a more just and accurate method of estimating the loss of Mr. O'Sullivan in being deprived of the use of his vessel, than any other mode that can be adopted. I have no doubt it may be allowed, should the department think it the preferable mode; but, as a certain discretion must always be exercised in cases of this nature, and as both modes are used by the courts, I cannot say that either mode is absolutely enjoined by the law, to the exclusion of the other.

Should it be adopted, two questions will arise:

- 1st. To what time shall the demurrage extend? and
- 2d. What other allowances should be made?

1. In regard to the first of these questions, I think it very plain, that the demurrage should be carried to the time when the register was received by Mr. O'Sullivan—that is to say, the 12th of February, 1824; and that it cannot, with any propriety, be allowed for a longer period. When the register was received, the detention ended; and, having ended, the demurrage must of necessity expire. The merchants who have given an opinion that the demurrage ought to extend until the vessel could be restored to the condition in which she was at the time of her seizure, and able to proceed to sea, admit that the owner obtained a real and serviceable possession of her when he received the new register; and besides, so far as the unseaworthiness consisted of any special depreciation over and above the ordinary wear and tear, it will be seen hereafter that I think it should be made the subject of a special allowance.

2. As to the other allowances, it is obvious that, if demurrage be allowed, it must be regarded, as observed by the Auditor, as an alternative or substitute for the mode of calculation adopted by him; but it will not, therefore, follow that no other

allowances can be made. On the contrary, it will be seen that, in the case of the *Apollon*, where demurrage was adopted as the primary means of indemnification, necessary travelling expenses and counsel fees were also allowed by the court. Numerous other cases to the same effect are to be found in the books; and in some of them the allowances, in addition to the demurrage, says Mr. Justice Story in the passage above quoted, "has reference to the ship's expenses, wear and tear, and common employment." Of course, if demurrage be allowed in the present case, no charge for any of those objects can be allowed. But demurrage does not include any special injury, beyond the ordinary wear and tear to the vessel; nor any special deterioration in her value; nor the personal or other expenses of the owner, incurred in consequence of the detention. In the present case, it would seem, from the affidavit of the supercargo, that the vessel of Mr. O'Sullivan was actually depreciated in value by the breaking up of her proposed employment, and her change of position from Buenos Ayres to New York, beyond ordinary wear and tear, to the extent of \$5,420. If this be the fact, then I am of opinion that such special depreciation, having been produced by the act of Mr. Forbes, and not being included in the demurrage, ought to be allowed. An injury of this nature is entirely distinct from the ordinary wear and tear: it stands on the same legal grounds as the dismantling of the vessel, the withdrawing of her furniture and equipments, or a direct and unnecessary injury to her hull or spars. In all these cases, special compensation must be made in addition to demurrage, or the owner is not indemnified for his actual losses. It will also be observed that, by the other standard of compensation, this special depreciation is allowed; because it helps to form the difference between the value at the time of seizure, and the value at the time of restoration, and is, therefore, included in the \$11,930 which forms the sum of that difference; the residue of that sum being made up of ordinary wear and tear. The personal expenses of Mr. O'Sullivan in Cadiz, &c., have already been spoken of, when viewing the subject in the other aspect.

My opinion, therefore, is, that if demurrage be allowed, (as

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I think it may be,) the following additional allowance should be made:

1. Special depreciation beyond ordinary wear and tear in the value of the vessel, if established to the satisfaction of the department.

2. Personal expenses of Mr. O'Sullivan while at Cadiz, and in returning and seeking the recovery of his vessel.

3. Marshal's and clerk's fees, and other expenses of the sale in New York.

4. Loss on the resale of the hides, if the same can be proved.

On a careful comparison of the foregoing views with those expressed by the Auditor, the chief difference between them will be found to consist in this: whichever rule of calculation be adopted, the foregoing opinion allows a compensation for Mr. O'Sullivan's deprivation of the use of his vessel—in the one case, in the shape of interest on her prime value; in the other, in connexion with other things, in the shape of demurrage. In addition to what has been said, I will add a few remarks for the purpose of obviating the suggestion of the Auditor, that such deprivation "is a constructive and consequential, not an actual loss," and, therefore, one that should not be allowed.

I cannot agree that the loss of the use of the vessel was merely a *consequential* loss; still less that it was constructive and not actual. It appears to me that the loss of the beneficial use of the vessel was the direct and immediate effect of the interference of Mr. Forbes. But, even if it is to be regarded as a *consequential loss*, it will not, therefore, follow that it is not an actual loss, in strict propriety of language, and within the meaning of the law.

A loss may be actual, positive, and real, and may be traced with certainty to a particular cause, though it does not immediately follow that cause. The distinction between *immediate* and *consequential* damages is a familiar one in the common law; it is the foundation of the distinction between the action of trespass and that of trespass on the case; the former of those actions being brought where the damage is immediate, and the latter where it is only consequential. In each case, however, *actual* damage is the subject of the suit, and must be

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proved to sustain it. The language of the act of Congress shows an evident design in its authors to exclude all claims for speculative and consequential losses, whether under pretence of indemnification for expected profits, or for any other expected advantages. All claims of that nature are cut off by the word "*actual*." That word, however, in its ordinary sense, as has just been shown, does not exclude consequential losses; and that it was not used in the act before me with any design of excluding such losses, is shown by the terms subsequently employed. Mrs. O'Sullivan is to be allowed the amount of actual loss, which may be shown to have been sustained "*in consequence* of the act of Mr. Forbes," &c. Consequential losses, therefore, by the express terms of the law, are to be subjects of compensation. In other words, every real positive loss sustained by the claimant's husband, *in consequence* of the detention of his vessel, and of her being sent to the United States, instead of her being allowed to proceed on her voyage from Buenos Ayres to Cadiz, is to be taken into account and paid under this act.

The loss of the use of the vessel, during her detention, was the first and most direct consequence of that detention. The vessel had been purchased with the design that she should be used in a voyage from Buenos Ayres to Cadiz, and thence to America. She came into Buenos Ayres with that design; and it was not abandoned until she was detained by Mr. Forbes. That detention, and his sending her to the United States, broke up the intended voyage, and, for the time being, deprived the owner of all beneficial use of his vessel. He lost the use of her as a necessary consequence of the act of Mr. Forbes; and this loss was actual, positive, and real.

I am, sir, &c., &c.,

B. F. BUTLER.

TO THE SECRETARY OF THE TREASURY.

RECALL OF MONEYS DEPOSITED WITH THE STATES.

No part of the moneys deposited with the States should be called for by the Secretary of the Treasury except to meet such wants of the treasury, under appropriations made by law, as may exist after exhausting the five millions reserved in the treasury by the deposit act; yet, a requisition may be made before the treasury shall be actually exhausted.

Recall of Moneys Deposited with the States.

But in such case, the time of payment to be named should be about the time when the available means on hand will have been exhausted.

ATTORNEY GENERAL'S OFFICE,
May 22, 1837.

SIR: In your letter of the 27th ultimo, you propose, for my opinion, several questions growing out of the present condition of the treasury and the probable demands upon it during the year; to which I shall proceed to reply in their order.

1. "Should a strong probability exist that, before the end of the year, a considerable amount beyond the five millions reserved in the treasury from distribution by the deposit law will be required to meet demands during the year, can the Secretary of the Treasury make a requisition upon the States for any part of the sum deposited with them, before the amount in the treasury, applicable to the current expenditure, shall be actually reduced below five millions of dollars?"

It appears to have been the design of Congress that no part of the moneys deposited with the States should be called for by the Secretary of the Treasury, except to meet such wants of the treasury, under appropriations made by law, as may exist after exhausting the five millions reserved in the treasury.

But I cannot think it necessary, before making a requisition for this purpose, that all the moneys in the treasury, including the five millions, shall have been actually expended. On the contrary, as the requisitions can only be made for comparatively small sums, payable at considerable intervals, during any one year, I think the Secretary not only has the power, but is bound, (in case he perceives a strong probability that, before the end of the year, a considerable amount beyond the five millions, and beyond such other moneys as are or may be subject to his control, will be required to meet necessary demands on the treasury,) to make a requisition on the States for so much of the sum previously deposited with them as he shall deem indispensable to meet those demands. But, in such case, I think the day of payment to be named in the requisitions should not be earlier than the time, or about the time, as near as may be, when, in the judgment of the Secretary, the five millions and all other available means will have

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been exhausted. In other words, I am of opinion that the period when the exigency will occur for requiring these moneys may be anticipated for the purpose of giving the *notice* required by the law, but not for the purpose of hastening the *payment*, which I think ought not to be required until the actual arrival or near approach of that period.

2. "Assuming that the Secretary may require the States to make repayment for expenditure before the amount in the treasury is reduced below five millions, may he legally call on the States to repay the amount which, in addition to the accruing revenue, may be considered necessary to meet the public expenditure during the year, leaving in the treasury the amount necessary to facilitate its operations and guard against contingencies, being about the sum of five millions of dollars?"

An answer to this question in the *negative* is included in the reply to the first question.

3. "'The deposit law provides that notice shall be given to the States, correspondent with the sums required to be repaid by them, (referring, of course, to the relative condition of the States and the treasury) after the whole surplus provided to be deposited with them shall have been received by the States. Should a portion of this surplus be required for expenditure, under the view taken in the preceding questions, or otherwise, can the Secretary of the Treasury retain the amount wanted, out of the instalments not actually deposited with the States, without the previous consent of the States?'"

In my opinion, the instalments of the surplus not already deposited with the States, being moneys in the treasury, not legally appropriated for expenditure, are subject to be used for any necessary wants of the treasury, growing out of laws subsequently passed, and the execution of which is charged on any moneys in the treasury not otherwise appropriated: provided, 1. That the execution of those laws cannot with propriety be postponed; and 2. That there are no other moneys in the treasury applicable to the purpose. Laws of this description, when these two conditions concur, must be considered as impliedly repealing, *pro tanto*, the unexecuted part of the distribution of the surplus revenue provided for in the deposit act of June 23d, 1836; but then the two conditions stated

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must have actually occurred before this implied repeal can take place.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

RIGHTS OF INDIAN RESERVEES.

The reservees under the Creek treaty of 1814, and the act of 1817, have not power to lease their lands; the renting for a term of years and removal from the State may be regarded as an abandonment of their reservations.

On their abandonment, the title becomes immediately vested in the United States by operation of law, and is to be then treated as if then for the first time acquired by a treaty.

ATTORNEY GENERAL'S OFFICE,

May 23, 1837.

SIR: In compliance with your request, I proceed to state my opinions on the questions proposed in the communication of the Commissioner of the General Land Office, bearing date the 20th of August last, and some time since referred to this office.

Inquiries having been made of the General Land Office respecting the light in which abandoned Creek reservations, originally confirmed under the first article of the treaty of the 9th of August, 1814, and the act of Congress for the execution thereof of the 3d of March, 1817, are regarded by the government, the Commissioner proposes the following questions:

“1. What circumstances are to be considered as constituting an abandonment of a reservation; by what proof must those circumstances be established; and by whom is the decision to be made, as to the reservation having reverted to the United States in consequence of such abandonment thereof by the reservee?”

“2. If it is decided that the reservation has been thus abandoned, can the land be considered as being liable to entry by floating claims before the officers for the district have been officially apprized of such decision, and the community have been notified by them that such tracts are subject to location or sale?”

Rights of Indian Reservees.

I. The first of these questions embraces several particulars, which I will notice in their order.

1st. The first article of the treaty of 1814 provides, "where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war, and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory, of one mile square, (to include his improvements,) as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor, or his descendants, the right of occupancy or of possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby." The act of 1817, so far as regards the tenure on which the reservations are to be held, is in substance the same as the treaty. The tract reserved to the friendly Indian is to be held by him and his descendants "so long as he or they shall continue to occupy the same," and no longer.

Those circumstances, and those only, by which the party ceases to occupy the reservation, should be considered as constituting an abandonment thereof. I cannot particularly define them in advance, further than to say that they must be voluntary and unequivocal; leaving no reasonable doubt either as to the intention of the party, or as to the fact itself.

In the case of Peter Random, mentioned in the letter of the Commissioner, who is said to have occupied and cultivated his reservation until 1833, and then to have leased it for twenty years, by a formal written lease, reserving rent, and removed to Louisiana, where he now resides,—I should think there could be no doubt, if such are the facts, that his occupancy had ceased, and that he had voluntarily abandoned his reservation. In my judgment, the reservee has no power to make a lease; nor do I think that he can, without a manifest violation of the words, object, and spirit of the treaty, be regarded as an occupant of the reservation, after he has ceased to have any

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direct personal connexion with the use and enjoyment of the land. For a full exposition of my views as to what is necessary to constitute the occupancy of land, I refer to my recent opinion in the case of Adams and Lapsley.

2d. The circumstances constituting a *cesser* of occupation, and an abandonment of the reservation, must, like all other facts necessary to be proved in judicial proceedings, be established by competent and credible evidence, to be produced to any tribunal in which the question shall arise for investigation and decision.

3d. I consider the words of the treaty as creating what is technically called a collateral limitation; and as giving to the Indian descendants a qualified inheritable estate, determinable on the *cesser* of occupation, and the voluntary abandonment of the premises. This would be the legal effect of the words used in the treaty, were they found in a private instrument; and this construction is agreeable to the nature of the case and the spirit of the treaty. It, will, therefore, follow that no judicial proceedings or actual entry on the part of the United States will be necessary to vest the estate in the United States. In this respect, these cases are to be distinguished from those in which an estate is granted on a condition, the breach of which renders the estate liable to be defeated, but does not divest it until entry by the grantor or his heirs. But where, as in the present instance, words of limitation are used, the estate of the grantee determines the moment the event arises, and at the same moment vests, by operation of law, in the grantor or his heirs; consequently, if the possession be vacant, the United States may immediately take possession and sell; and if occupied, the occupant must be treated precisely like every other occupant of the public lands who has entered without authority.

II. Whenever the estate of the Indian reservee shall have determined, the land becomes a part of the public domain; and from the time when the fact is known to the officers of the land district, it will be their duty to treat it as such. Its liability to entry for floating claims, or for other purposes, will, from that time, be the same as if it had then for the first time been ceded to the United States. This general principle, in connexion with the usage of the office, and the course which the actual

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state of things in the district, including the reservation at the time when the tract reverts, may require, will, I presume, furnish a sufficient answer to the second of the above questions.

I am, very respectfully, your obedient servant,

B. F. BUTLER.

HON. LEVI WOODBURY.

 DEPOSITES OF MONEYS IN HANDS OF DISBURSING OFFICERS.

Under the order of the Treasury Department, approved by the President on the 5th of October, 1833, disbursing officers may legally keep the public moneys intrusted to them on deposit in the banks heretofore selected by the treasury, and which now have the public money.

Disbursing officers may legally make special deposits of their funds in non-specie-paying banks, if so directed by the President, where they will agree to receive the funds in that way.

Any bank not restrained by its charter, or other statutory enactments, nor by judicial process, from receiving special deposits, is competent to enter into a contract for the safe-keeping and return of a special deposit in such way and on such terms as may be agreed on.

Payment by disbursing officers to the credit of the United States must be made to the Treasurer, or to some specie-paying bank.

• ATTORNEY GENERAL'S OFFICE,

May 26, 1837.

SIR: In your letter of the 20th instant, after calling my attention to the second section of the act of March 3d, 1809, by which it is provided that certain agents of the government for the disbursement of public moneys "shall, whenever practicable, keep the public money in their hands, in some *incorporated* bank, to be designated for the purpose by the President of the United States;" and to the action of the Secretary of the Treasury, approved by the President, in relation to such moneys, as well as under the deposit act of the 23d of June last, you propose for my opinion, by desire of the President, the following questions:

"1. Can disbursing officers of the government, under the provisions of the acts and regulations referred to, legally keep the public moneys in their hands, on deposit in any specie-paying banks? and if so, what action, if any, is necessary on the part of the Executive to authorize it?"

Deposites of Moneys in Hands of Disbursing Officers.

"2. Can disbursing officers, under the provisions of the act of 1809, legally make special deposits of their funds in non-specie-paying banks? and if so, what measures, if any, will it be advisable to adopt to render the banks liable for the safety of their deposits.

"3. In many cases, disbursing officers and others are required to pay balances in their hands into bank, to the credit of the Treasurer of the United States, that they may be credited in their account with the sum deposited, on a warrant issued as required by law. Can these officers be required to make the deposits with collectors of the customs or receivers of public moneys, to the credit of the Treasurer, so as to receive a credit in their accounts with the government? And can the collectors of the customs and receivers be legally required to receive such deposits, and become responsible for the amount to the United States? or must they be paid into some public depository which redeems its notes in specie, or be paid to the Treasurer in this city?"

In answer to the first of these questions, I have the honor to inform you that, in my opinion, the provisions of the act of the 23d of June last were not intended to apply, and do not apply, to public moneys drawn out of the treasury, and placed in the hands of disbursing officers for expenditure; and, consequently, that the act of 1809 has not been repealed or affected by those provisions. I think, however, that the act of June 23d, 1836, regulating, as it does, the deposits of the public money in the treasury, should be resorted to by the President as a guide for the exercise of the discretionary power vested in him by the act of 1809; and that, so far as circumstances may permit, he should conform to it in any directions he may give concerning moneys in the hands of disbursing agents. It was in accordance with this principle that the order of your department, approved by the President on the 5th of October, 1833, was issued. Under that order, and until it shall be revoked or modified, I think the disbursing officers may legally keep the public moneys intrusted to them, on deposit in the banks heretofore selected by the treasury, and which now have the public money; but it may be questioned whether the events which have recently occurred, and which have led to the dis-

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continuance of those banks as depositories for the treasury, do not require some modification of such order. Notwithstanding the suspension of specie payments by the incorporated banks, the President may still designate such a bank as a depository for disbursing officers, if, in his judgment, it shall be practicable to employ it for that purpose; because it is not positively required, as an indispensable requisite, by the act of 1809, that the bank should pay its notes in specie on demand. In this respect the act of 1809 differs from that of 1836. But when and how far it may be expedient for the President to act on this distinction, is a matter on which this office has no authority to advise.

In reply to the second question, I have the honor to state, that I think disbursing officers may legally make special deposits of their funds in *non*-specie-paying banks, if so directed by the President, and if the banks agree to receive such funds in that way. Any bank, not restrained by its charter or other statutory enactments, or by some judicial process, from receiving special deposits, will be competent to enter into a contract for the safe-keeping and return of a special deposit, in such way and on such terms as may be agreed on; and the district attorney of the United States, in the district where the bank proposed to be employed for this purpose is situated, will, no doubt, be able to give the information and advice which will be necessary to the settlement and execution of a proper contract.

In my opinion, the payments referred to in the third question must be made to some specie-paying bank employed as a depository under the act of June last, or to the Treasurer of the United States in this city, and cannot be required to be made to the collectors or receivers; nor can those officers be compelled to receive them, nor, if received by them, would their sureties be responsible therefor.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

Mandamus against the Postmaster General.

MANDAMUS AGAINST THE POSTMASTER GENERAL.

The circuit court of the District of Columbia is not invested with authority to issue a mandamus against the Postmaster General to compel him to execute an act of Congress in a particular way.

ATTORNEY GENERAL'S OFFICE,

May 30, 1837.

SIR: It appears by your letter of the 27th instant, and the paper enclosed therein, that application has been made by William B. Stokes and others to the circuit court of the District of Columbia for the county of Washington, for a writ of mandamus, to be directed to the Postmaster General of the United States, directing him to execute a certain act of Congress in the mode specified in such application; and that, in accordance therewith, the court has granted a rule upon the Postmaster General to show cause why such writ should not issue. In answer to your call for my opinion and advice as to the jurisdiction of the court to entertain this procedure, and to issue the writ applied for, I have the honor to inform you that I am clearly of opinion that no such jurisdiction is possessed by it.

In the case of *McIntyre vs. Wood*, (7 Cranch's Reps. 504,) a similar question was brought up for decision in the Supreme Court of the United States, upon a division of opinion in the circuit court for the district of Ohio, upon a motion for a mandamus to the register of a land office at Marietta, commanding him to grant final certificates of purchase to the plaintiff for certain lands in that State. The Supreme Court decided that the circuit court had no power to issue such a writ; the judges being of opinion that the power conferred by the judiciary act of 1798, on the circuit courts, to issue the writ of mandamus, is exclusively confined to those cases in which it may be necessary to the exercise of their jurisdiction. They considered the constitutional provisions concerning the judicial power of the United States broad enough to authorize the delegation to the circuit court of a power to issue writs of mandamus in cases where some ministerial act is necessary to the completion of an individual right arising under laws of the United States; but as the acts of Congress delegated no such power, the conclusion was inevitable that it could not be exercised. The

Power of Secretary of the Treasury to Remit Fines.

principle of this decision was recognised in the subsequent case of *McClung vs. Silliman*, (6 Wheaton's Reps. 598,) and has never, to my knowledge, been called in question.

Unless, therefore, some power in relation to the writ of mandamus has been delegated to the circuit court for the county of Washington, beyond that possessed in such cases by other circuit courts of the United States, the point must be regarded as settled by the highest judicial authority. I have carefully examined the acts of Congress organizing the court and regulating its jurisdiction; but, though it possesses some powers not delegated to the other circuit courts, I do not find that it has ever been authorized in express terms, or by any general grant of power, to issue a writ of mandamus to an executive officer of the United States. In this respect, I think its jurisdiction the same with that of the other courts; and, consequently, that it cannot rightfully entertain the procedure referred to.

I am, sir, &c., &c.,

B. F. BUTLER.

To the POSTMASTER GENERAL.

POWER OF SECRETARY OF THE TREASURY TO REMIT FINES.

After a fine has been imposed by a collector of customs for a violation of the revenue laws, and collected and distributed under the acts of March 3, 1797, and July 14, 1832, or either of them, the Secretary of the Treasury is not authorized to remit it.

ATTORNEY GENERAL'S OFFICE,

June 2, 1837.

SIR: It appears from your letter of the 23d of November last, that "a fine of \$50 was incurred by J. H. Pease, under the 9th section of the act of 1793, which was paid to the collector of Nantucket, who charged himself with \$25, being the moiety which accrued to the United States; that, subsequently, the Secretary of the Treasury directed the said fine to be remitted; and that the collector repaid the same to Mr. Pease, and now claims a credit in his account for the whole amount thereof—\$50." On this case you ask my opinion "whether

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the department could, under the circumstances of the case, grant a remission; and what effect the act of remission is to have on that portion of the fine to which the informer or custom-house officers are entitled?"

In answer to these questions, I have the honor to inform you, that, in my opinion, if the Secretary of the Treasury has power to grant a remission after the fine has been actually paid to, and distributed by, the collector, it can only be as to that portion of the fine which has been paid to the United States as its distributive share. This limitation of his power necessarily results from the principles recognised in the case of *McLane vs. the United States*, (6 Peters, 404.) But I am also of opinion that, after the fine has been actually paid to and distributed by the collector, the Secretary has no power, under the acts of March 3d, 1797, and July 14th, 1832, or either of them, to remit any part thereof. The first of these laws evidently contemplates the action of the Secretary before the actual receipt of the money; and the last merely authorizes him to substitute a less formal mode of ascertaining the facts, in lieu of that prescribed in the former law. The power of the Secretary, in other respects, is not enlarged or varied by the act of 1832.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

THE CREEK INDIAN ORPHAN FUND.

The moneys received from the sale of reservations located for Creek orphans, under the treaty with the Creeks of March 24, 1832, were properly brought into the treasury, and may be drawn out for investment or payment whenever the President shall direct.

ATTORNEY GENERAL'S OFFICE,

June 2, 1837.

SIR: By your letter of the 26th of April, you asked my opinion on several questions proposed by the Treasurer of the United States; to which I now proceed to reply.

1. "Has the Treasurer the legal authority vested in him,

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without the sanction of any other officer of the Treasury Department, to direct a bank to refund money in any case before it is receipted for by the Treasurer upon the covering warrant, upon the ground that it has been deposited to his credit irregularly or through mistake?"

As a general rule, this question must, in my opinion, be answered in the negative.

2. "The practical question, on which the Treasurer desires information, relates to certain moneys received from the sale of certain reservations located for Creek orphans, under the treaty with the Creeks of March 24, 1832, and deposited, by direction of the Commissioner of Indian Affairs, to the credit of the Treasurer of the United States, in the Bank of Mobile. The Commissioner requests the Treasurer to direct these moneys to be placed to the credit of the Commissioner, to the end that they may be disposed of as originally intended, without resorting to Congress for further legislative provision. The Treasurer not only doubts his power to correct the error, if any there was, in the depositing of this money to his credit, but also asks, 'Whether, under the 1st section of the act of January 9, 1837, it was not properly brought into the treasury?' "

The section referred to is in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sales of lands that have been, or may be hereafter, ceded to the United States by Indian tribes, by treaties providing for the investment or payment of the Indians, parties thereto, of the proceeds of the lands ceded by them, respectively, after deducting the expenses of survey and sale, any sums stipulated to be advanced, and the expenses of fulfilling any engagements contained therein, shall be paid into the treasury of the United States, in the same manner that moneys received from the sales of public lands are paid into the treasury."

All the lands of the Creek tribe east of the Mississippi were ceded, by the first article of the treaty of March 24, 1832, to the United States. The second article provides that twenty sections "shall be selected, under the direction of the Presi-

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dent, for the orphan children of the Creeks, and divided, and retained or sold for their benefit, as the President may direct." The moneys in question are the proceeds of the sale of these selected lands; and as the President is undoubtedly authorized by the treaty to invest such proceeds for the benefit of the orphans interested therein, or to pay over to them such proceeds as he may direct, these moneys may well be regarded as coming within the provisions of the section above quoted, and therefore as properly brought into the treasury.

I think it proper to add, (and I wish the opinion just expressed to be regarded as proceeding on this ground,) that the moneys in question, if liable to be brought into the treasury under the first section of the act of January 9, 1837, will also be liable to be drawn out for investment or payment, whenever the President shall so direct, under the second section of the same law; the latter section being evidently intended to be coextensive with the former.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

DUTIES OF LAND OFFICERS IN RESPECT TO ENTRIES AND CERTIFICATES.

Where H. and F. applied at a land office to enter certain lands, but not being able to comply with the regulations of the department, procured them to be marked and reserved from sale to T., who, soon thereafter, applied to purchase and pay for them, and was refused; and, afterwards, H. and F. made payment and obtained a certificate of purchase—**DECIDED**, that the land officers should have complied with T.'s offer; and that, as a patent has not yet issued, the matter is yet under control of the General Land Office.

ATTORNEY GENERAL'S OFFICE,

June 5, 1837.

SIR: In your letter of the 18th of March last, you state the following case for my opinion:

"Messrs. Hough and Fisk applied to enter certain lands at the Chocchuma (Mississippi) land office. Not being prepared to comply with certain formalities required by the regulations of the department, the sale was not perfected at the time, but

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the lands applied for were so marked on the plats, and reserved from sale. Subsequently, Doctor Taylor made application to enter and purchase the same lands. His application was refused. Soon after, Messrs. Hough and Fisk complied with the formalities required, made payment, and received a certificate of purchase."

Upon this case you ask the following question:

"The United States having thus parted with their title to the lands in question, and received the legal consideration, through the hands of their duly constituted agents, the question arises, Can they now, assuming the conduct of such agents to have been irregular, make a title to any one else by a subsequent sale; and especially when it is not alleged there existed any fraud or collusion between the land officers and purchaser?"

When the United States have actually parted with their title, on the receipt of the legal consideration, they cannot make a valid title to any other person by a subsequent sale, (except where the first title was, from irregularity or some other cause, absolutely void in law,) until such first title shall have been avoided by some appropriate judicial proceeding; but where the irregularity is of such a character as to render the title absolutely void, and not merely voidable, a new title, made without any such proceeding, will be effectual to pass the estate.

In the case submitted, the title has never passed from the United States, because the patent has not yet been issued; and, as appears from the documents accompanying your communication, the contest between the parties is, as to which of them shall receive the patent.

On the facts stated above, it appears to me that Doctor Taylor ought to have been allowed to purchase the lands applied for by him. The application of Messrs. Hough and Fisk, not being accompanied by the requisite formalities, was a mere nullity, and gave them no legal or equitable right to the lands applied for. The lands, in contemplation of law, stood in the same condition, when Doctor Taylor applied to purchase them, as if Messrs. Hough and Fisk had made no attempt to become the purchasers; and, in my opinion, the land officers should have complied with his offer, and should not have proceeded to make the sale to Messrs. Hough and Fisk. That sale, under the

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circumstances, must be regarded as improvidently made; and, as the patent has not yet issued, the General Land Office has such a control over the subject as to do justice to Doctor Taylor, without driving him to his suit against the land officers. This may be done either by directing the land officers to allow Doctor Taylor to complete his purchase, and, on his production of the proper evidence, by granting him a patent, (in which case the money paid by Messrs. Hough and Fisk should be refunded to them;) or by suspending further proceedings until Taylor can establish his equitable rights in a court of justice.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

EMPLOYMENT AND COMPENSATION OF PAYMASTERS' CLERKS.

There is no provision of law which authorizes the employment of persons for clerks to paymasters other than non-commissioned officers; yet the department, in the exercise of its general powers, may allow a private citizen to be employed when no capable non-commissioned officer can be obtained.

The department may take the highest pay allowed by the laws now in force to any non-commissioned officer of the corps to which the person employed as paymaster's clerk belongs as the standard of compensation, and may allow him double the same.

ATTORNEY GENERAL'S OFFICE,
June 7, 1837.

SIR: In your letter of the 15th of April last, you ask my opinion on the question whether the department has authority to change the compensation of the clerks of paymasters, as proposed in the communication of Major Randall, enclosed for my perusal.

Major Randall's proposal is, that the commutation of the double pay, and all other allowances for paymasters' clerks, be made from the grade of *ordnance sergeants*, who receive, under the existing laws, a higher rate of pay than any other non-commissioned officers of the army.

The section of the act of the 24th of April, 1816, provides

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that each paymaster "shall be allowed a capable non commissioned officer as clerk, who, while so employed, shall receive double pay, and the actual expenses of transportation while travelling under orders in the discharge of his duty." The pay of a company sergeant, at the time of the passing of this law, was eight dollars per month; and that rate of pay, it appears, was then fixed by the Secretary of War, as the compensation of non-commissioned officers employed as paymasters' clerks. The act of March 2, 1833, (vol. 8, p. 813,) increases the pay of the non-commissioned officers of the army generally; but the pay of the ordnance sergeants is regulated not by this act, but by a law exclusively applicable to that corps. I think the department may lawfully take the highest pay allowed by the laws now in force to any non-commissioned officer of the corps to which the person employed as paymaster's clerk belongs, as the standard of compensation, and may allow him double the same; but, unless the non commissioned officer so employed is actually an ordnance sergeant, I do not see how the pay of that corps can be adopted as the standard.

You also ask my views as to the power of the department to authorize the employment of private citizens in the capacity of clerks to paymasters. There is no express provision of law which authorizes the employment of any person other than a non commissioned officer; and whenever a *capable* non-commissioned officer can be found, it would be illegal to employ a private citizen. But, as the law proceeds on the assumption that a clerk is necessary, and that he ought to be capable of discharging the duties of the employment, I presume that the department, in the exercise of its general powers, may lawfully allow a private citizen to be employed when no capable non-commissioned officer can be obtained; and may pay him a reasonable compensation, not exceeding that to which a non-commissioned officer of infantry would be entitled, out of any general fund applicable to the payment of contingencies for the army.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Power of Secretary of the Treasury respecting Customs.

POWER OF SECRETARY OF THE TREASURY RESPECTING CUSTOMS.

Moneys collected for customs and deposited to the credit of the treasury, but not actually brought into the treasury by covering warrants, are not so blended with the moneys in the treasury as to require a special appropriation by law in order to apply them to the payment of current expenses, but may be applied as if they had been retained in the hands of the collectors.

ATTORNEY GENERAL'S OFFICE,

June 10, 1837.

SIR: In your letter of the 7th instant, you ask my opinion on the following question—"Whether, under the general power over the revenue of the country with which the Secretary of the Treasury is clothed by law, he may not direct the Treasurer of the United States to instruct any bank in which money may have been deposited to the credit of that officer by any collector of the customs, (but with which money the Treasurer has not been charged upon the books of the treasury, by covering warrants,) to replace the same, or any specific portions thereof, again to the credit of the collector, in order that it may become subject to the check of the latter to meet his current expenses?"

I think this question must be answered in the affirmative.

Until the moneys deposited in bank by the collectors, to the credit of the Treasurer, shall have been actually brought into the treasury by covering warrants, the Treasurer is not legally chargeable with them; and though they are moneys of the United States, they are not so blended with the moneys in the treasury as to require a special appropriation by law to authorize their application to the payment of any demand legally chargeable in the receipts of the custom houses. And as the current expenses of the several collection districts might lawfully have been paid out of the moneys referred to, had they been retained in the hands of the collectors, there can be no legal objection to causing them to be applied to that purpose, if the subsequent receipts at the custom-houses shall prove inadequate.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

Extra Pay for Extra Services.

EXTRA PAY FOR EXTRA SERVICES.

The clerk of the navy and privateer pension and navy hospital funds is entitled, over and above his salary, to a fair compensation for services performed by him in respect to the United States coast survey, as those services were no part of his official duty.

ATTORNEY GENERAL'S OFFICE,

June 10, 1837.

SIR: I have had the honor to receive, and have duly considered, the papers enclosed in your letter of the 2d ultimo, relative to the claim of Mr. Ragsdale, formerly warrant clerk in the Navy Department, and now clerk of the navy and privateer pension and navy hospital funds, who claims special compensation for services rendered as a clerk in respect to the United States coast survey, on the ground that such services were no part of his regular official duty.

The papers do not give such an account of the nature and duties of the warrant clerkship as to enable me to decide on the validity of that part of Mr. Ragsdale's claim which appertains to the period when he held that office. I find, however, that the appointment of a clerk in relation to the navy and privateer pension and navy hospital funds, is expressly provided for by the fourth section of the act of the 10th of July, 1832, regulating those funds; and the salary to be allowed such clerk for those services is specially designated by the same section, which also provides that such salary shall be "a full compensation for his *services*, and in lieu of all *commissions* or other *allowances*." But this prohibition can only refer to services rendered by him *as pension and hospital fund clerk*, and to commissions and allowances for such services; and cannot exclude him from claiming and receiving a fair compensation for any services which he may have rendered in another and entirely distinct capacity. As a clerk appointed under the act of July 10, 1832, he was undoubtedly bound, for the legal salary, to perform all the clerical duties appertaining to the funds mentioned in the law; but he was not bound, in addition to those services, to perform clerical duties concerning the coast survey. These latter duties were clearly extra official; and he is therefore equi-

Scrip for Revolutionary Land Warrants.

tably, as well as legally, entitled to a just compensation therefor.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

CONSTRUCTION OF ACT CONCERNING THE NAVY PENSION FUND.

The act of the 3d of March, 1837, for the more equitable administration of the navy pension fund, ought not to be so construed as to include cases where the death occurred anterior to the date of the law by which the fund was established.

ATTORNEY GENERAL'S OFFICE,

June 12, 1837.

SIR: In reply to the question proposed in your letter of the 9th instant, I have the honor to inform you that, in my opinion, the act of the 3d of March last, "for the more equitable administration of the navy pension fund," ought not to be so construed as to include cases where the death occurred anterior to the 23d of April, 1800, the date of the law by which the fund was established. Until Congress shall, by express words, make provision to the contrary, this limitation fairly results from the history of the fund, and the language of the act creating it.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

SCRIP FOR REVOLUTIONARY LAND WARRANTS.

Scrip for revolutionary land warrants may be issued; and for that purpose the first section of the act of May 30, 1830, is now in force.

ATTORNEY GENERAL'S OFFICE,

June 14, 1837.

SIR: In answer to the question proposed in your letter of the 9th instant, I have the honor to inform you that, in my opinion, the sixth section of the act for the relief of certain officers and soldiers of the Virginia line and navy, and of the continental army, during the revolutionary war, approved May

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30, 1830, so far as it extends the provisions of the first and fourth sections of that act to military land warrants issued by the United States in satisfaction of claims for bounty lands for services during the revolutionary war, is yet in force; and that, under the first section so referred to, scrip may still be issued in satisfaction of such warrants; which scrip, under the fourth section, will be receivable in payment of public lands, and have the other attributes mentioned in that section.

This opinion is founded on a general view of the various provisions contained in the above mentioned act, and in numerous statutes applicable to the same subject, before and since passed; all of which are enumerated in the report of the Solicitor of the General Land Office of the 9th instant, and the communication from the officer having charge of the bureau of Virginia military land and scrip, of the 7th instant: both of which papers were enclosed in your communication. As I fully concur in the views taken by those officers, (except as to the remark made by the latter on the second section of the act of March, 1835, at the conclusion of his report,) I beg leave to refer to them, and especially to the report from the bureau of military land and scrip, as embracing, with the exception stated, the grounds of my opinion.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

The Hon. LEVI WOODBURY,
Secretary of the Treasury.

INDULGENCES ON CUSTOM-HOUSE BONDS.

The Solicitor of the Treasury may grant indulgences upon custom-house bonds, in the form of instructions to district attorneys who shall have received them for prosecution, in such cases and on such terms as shall be deemed advantageous to the United States.

And, although the Solicitor has no jurisdiction of bonds until they are placed in the hands of district attorneys, he may, in proper cases, give the instructions conditionally in advance, as to the course to be pursued.

ATTORNEY GENERAL'S OFFICE,

June 27, 1837.

SIR: On the 9th and 10th ultimo I had the honor, in compliance with the request contained in your letter of the 9th, enclosing for my consideration a report made to you on that day

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by the Solicitor of the Treasury, to state to you verbally my opinion on the power of the department, especially through the Solicitor of the Treasury, to grant indulgences on custom-house bonds; and I now proceed to commit to writing the substance of that opinion, with the reasons on which it was founded.

The 65th section of the revenue collection act of the 2d of March, 1799, provides, that "when any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall forthwith, and without delay, cause a prosecution to be commenced for the money thereon, by a suit at law in the proper court." The like provision was contained in the revenue collection laws of 1789-'90. It is obvious that the clause above quoted was intended to take away all discretion from the collector, and to compel him, in every case where default shall have been made in the payment of a duty-bond, instantly to deliver such bond to the district attorney, the officer charged by law with the institution and management of suits in favor of the United States. No indulgence can be granted by the collector, on his own motion, after a bond shall have become due; nor can the department, after failure of payment, authorize him to grant any such indulgence. His duty, however, is discharged the moment he has delivered the bond to the district attorney, because it is only in this way and to this extent that he can "cause a prosecution to be commenced."

The district attorney, on receiving the bond, is undoubtedly bound, as a general rule, forthwith to commence a suit; and if, by means of any unauthorized delay in the institution of the suit, the debt, or any part of it, should be lost, he would be personally responsible. The degree of diligence with which he is to act may, however, be modified by the system of procedure in force in his district, and by other circumstances, which may sometimes justify more or less delay in the actual commencement of the suit. But no delay by which the obtaining of judgment at the first term after he shall have received the bond shall be jeopardized, or by which any other legal advantage shall have been lost to the United States, can be granted by this officer, without authority from the Treasury Department.

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After the bond shall have come into the hands of the district attorney, the proceedings on it are under the control of the Treasury Department, to be exercised through the Solicitor of the Treasury, who has authority, in my opinion, to direct a stay of proceedings either *before* or *after* suit, on such terms as he may think proper, whenever he shall be satisfied that the security of the debt and the ultimate collection thereof will be promoted by such a measure.

The leading object of that part of the duty law which is now under consideration is to secure the speedy and certain collection of the money due on the bond; and though, as has been seen, the collector has no discretion whatever, and the district attorney very little, as to the steps to be taken by them in the accomplishment of this object, the Treasury Department is in a different condition. Whilst it is undoubtedly bound to see that the particular duty prescribed to the collector is faithfully discharged by him, and that the district attorney grants no unauthorized or injurious delay, it possesses, and has always possessed, an enlarged discretionary power in the collection of the revenue, by virtue of which it may control the proceedings of the district attorney in such manner as it shall deem most likely to effectuate the great end of the law—the most speedy and certain collection of the debt.

By the 2d section of the act of September 2, 1789, organizing the Treasury Department, it is made the duty of the Secretary of the Treasury to *superintend* the collection of the revenue; and, in the performance of that duty, he is authorized to “direct the superintendence of the collection of the *duties* on *import* and *tonnage* as he shall judge best.”

This general power has never been withdrawn from the Secretary, although particular duties in aid thereof have been from time to time imposed by law on particular officers of the department.

The act of March 3, 1817, (section 10,) makes it the duty of the First Comptroller “to superintend the recovery of all debts to the United States, to direct suits and legal proceedings, and to take such measures as may be authorized by the laws to enforce prompt payment of all such debts.”

Under the authority conferred by these laws, the Treasury

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Department, through the First Comptroller, frequently exercised the power of staying proceedings in suits on custom-house bonds, and sometimes of delaying the commencement of suits on such bonds. Those indulgences appear to have been generally confined to cases where the obligors would have been subjected to serious embarrassment, and the collection of the debt postponed, by the rigid prosecution of the bonds; and to have been granted on the condition of additional security, or of other terms calculated to increase the safety of the debt.

By the act of the 15th of May, 1820, it was made the "duty of such officer of the Treasury Department as the President of the United States shall from time to time designate for that purpose as the agent of the treasury to direct and superintend all orders, suits, or proceedings, in law or equity, for the recovery of money, chattels, lands, tenements, or hereditaments, in the name and for the use of the United States." Whilst this law was in force the discretionary power of staying proceedings on duty bonds was from time to time exercised through the agent of the treasury.

The act of May 29, 1830, creating the office of Solicitor of the Treasury, provides (section 1) "that the powers vested in, and the duties required from, the agent of the treasury, shall be transferred to, vested in, and required from, the Solicitor of the Treasury." The 3d section provides "that, whenever any bond for duties shall be delivered to a district attorney for suit, the collector so delivering the same shall immediately give information thereof to the Solicitor of the Treasury, with a full and exact description of the date of such bond, the amount thereon due, and the names of all the obligors thereto; and the Solicitor of the Treasury shall thereupon make such entry thereof, as that the said attorney may duly appear chargeable therewith until the amount thereof shall have been paid to the United States, or he shall have obtained judgment thereon, and delivered execution to the marshal, or shall otherwise have been duly discharged therefrom." The same section requires the district attorneys to make periodical returns to the Solicitor of all cases in which the United States are parties; and the 5th section provides that the Solicitor "shall have power to instruct the district attorneys, marshals, and clerks of

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the circuit and district courts of the United States, in all matters and proceedings appertaining to suits in which the United States is a party or interested, and cause them, or either of them, to report to him from time to time any information he may require in relation to the same." The 7th section authorizes him, with the approbation of the Secretary of the Treasury, "to establish such rules and regulations, not inconsistent with law, for the observance of collectors, district attorneys, and marshals, respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of the revenues and debts due and accruing to the United States."

The general discretionary powers granted by the acts above quoted to the Secretary of the Treasury, the First Comptroller, and the agent of the treasury, are not extinguished by the act of 1830; but, so far as relates to the action of the district attorneys, those powers are now to be exercised through the Solicitor of the Treasury. A direction to stay proceedings in a suit commenced on a duty bond is clearly an *instruction* in a matter appertaining to a suit in which the United States is a party; and, therefore, plainly within the express words of the 5th section of the act of 1830. I think, also, that a direction to the district attorney to stay the commencement of a suit on a duty bond handed over to him by the collector, in such cases and on such terms as shall be deemed advantageous to the United States, is also an *instruction* in a matter appertaining to a suit in which the United States is interested; and, therefore, that under the same section it may lawfully be given by the Solicitor. Nor can I perceive any legal objection to the transmitting of such an instruction to the district attorney in anticipation of the delivery of the bond to him. Technically, the jurisdiction of the Solicitor does not commence until the collector has reported to him the delivery of the bond; which report cannot be made until after the bond has been placed in the hands of the district attorney, who will usually have commenced a suit before the Solicitor receives the report, especially if it be from a post very remote from the seat of government.

The inconveniences of distance and lapse of time are only to be overcome, when the public interest demands it, by giving

Compensation of District Attorneys.

conditional instructions in anticipation of expected events. This is constantly done by the executive departments; and if the actual state of things, when it occurs, justifies the interference of the department, the instruction will be as valid as if it had not been until after the occurrence of the event to which it applies. This course has, indeed, been adopted by the Solicitor of the Treasury in his standing instructions to the district attorneys concerning the measures to be taken by them when they shall receive duty bonds for collection. In cases, therefore, where it shall be deemed proper to direct the district attorneys to grant indulgence *before* suit commenced, I think that object may be accomplished by transmitting, in advance, such instructions as to the course to be pursued in this respect, on bonds thereafter to be handed over to him, as the case may demand.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

COMPENSATION OF DISTRICT ATTORNEYS.

The reference to the fees of the State courts, contained in the acts of 1789 and of 1799, does not apply to the courts nor to the district attorneys of States where there are no fees by law, but refers to those where the laws give taxable fees.

The United States should, in such cases, make a reasonable allowance to their attorneys in the States where the latter can look only to their employers for compensation.

ATTORNEY GENERAL'S OFFICE,

July 5, 1837.

SIR: I have perused and considered the communication of D. J. Baker, esq., district attorney of the United States for the State of Illinois, of the 6th of April, 1836, some time since referred to me, but do not find therein any sufficient reasons for excepting his case from the general rules stated in my opinion of the 7th of March, 1836. Mr. Baker correctly supposes that I was ignorant of the fact, at the time of preparing that opinion, that in the State of Illinois no fees are allowed by law to be taxed and recovered in suits in the supreme court of that State; and it must be admitted that this circumstance very materially

Duty of the Executive respecting Alien Residents.

distinguishes the district attorney of that State from other district attorneys of the United States. There is also force in the argument, that, as the usage and law of the State of Illinois allow attorneys to charge to their employers a reasonable fee for their services, the United States ought to be willing to make a similar allowance as an act of justice to their district attorney, who will otherwise receive no compensation for his ordinary official services. But I cannot think that the provision quoted by Mr. Baker from the act of 28th of February, 1799, and which gives the district attorney "such fees in each State respectively as are allowed in the supreme court thereof," has reference to any such usage or general law; on the contrary, I think it refers to the fees which by law are *taxed* and allowed to be recovered in the suit in which they arise. This is the natural sense of the phrase; and by connecting the act of 1799 with the judiciary act of 1789, which declares that the district attorney "shall receive, as a compensation for his services, such fees as shall be *taxed* therefor in the respective courts in which the suit or prosecution shall be," and which act is *in pari materia*, I think it will be evident that Congress intended to refer to the State laws giving taxed fees in the principal suit. There is the less reason for giving to the law of 1799 the construction contended for by Mr. Baker, inasmuch as there was then no State in the Union in which taxed costs were not allowed in the supreme court of the State.

It is evident, however, that Mr. Baker has an equitable claim for compensation; and if the subject were properly brought before Congress, I can scarcely doubt that some general provision concerning the district attorney of Illinois would be made by them.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

DUTY OF THE EXECUTIVE RESPECTING ALIEN RESIDENTS.

It is the duty of the Executive of the United States, to whom the care of our foreign relations is committed, to take all lawful measures for the protection of alien subjects of a state with whom the United States are at peace, who shall have placed themselves under the safeguard of our laws.

Duty of the Executive respecting Alien Residents.

But where aliens shall have suffered violence from citizens of the United States, they can be protected only by the redress to be afforded in the courts, and the special interposition of the legislature.

The State courts only have jurisdiction of the criminal offence in such cases; the circuit court of the United States of a civil action, where the offenders are citizens.

ATTORNEY GENERAL'S OFFICE,

July 5, 1837.

SIR: I have bestowed on the communication of the French chargé d'affaires, of the 1st of March last, referred to me by your order, that deliberate attention which was due to the source from which it proceeded, as well as the subject of which it treats.

Mr. Pageot complains that two Frenchmen, domiciled in the city of New Orleans, have been subjected to certain acts of gross violence—the one on his person, and the other in his house; and invokes, in their behalf, the interposition of the federal government.

There can be no doubt, under the laws of nations, and independently of any treaty provisions, that alien subjects of a state with whom the United States are at peace, coming within our territory, and placing themselves, with the consent of the general and State governments, under the safeguard of our laws, are entitled to be protected in their personal rights, in like manner as citizens; and that it is the duty of the Executive of the United States, to whom the care of our foreign relations is committed by the constitution, to take all lawful measures for the promotion of this end. It is obvious, however, from the principles on which our institutions are founded, and their particular structure, that the capacity of the federal Executive, in this respect, will in most cases be limited to the mere duty of taking care that such laws as may have been passed by Congress on the subject be faithfully executed; and redress can only be obtained through the courts of justice, or, in fit cases, by the special interposition of the legislature.

The acts complained of by Mr. Pageot, in each case, constitute a criminal offence, and furnish also ground for a private action for the recovery of damages.

We have no act of Congress giving to the courts of the United States jurisdiction of the criminal offence; it can there-

Power of the President to Expel Intruders from Indian Lands.

fore only be tried, and the offenders punished, in the proper State court. But, if those offenders are citizens of Louisiana, the parties injured may, as aliens, bring their actions for damages in the circuit court of the United States for the State of Louisiana. As the criminal prosecution must be had in the State court, the federal government cannot interfere therewith, further than to solicit to it the attention of the State authorities, and to instruct the district attorney of the United States to render such assistance as he may be able to afford. That officer is not bound, as a part of his regular official duty, to appear in the State tribunals; and when he does so appear, it is only in the character of an advocate or counsel; but instructions of this sort are generally followed in that character. In like manner, the aid of the same officer may be obtained in any civil actions prosecuted in the circuit court of the United States.

Beyond the methods already suggested, I perceive no step within the power of the President, under the existing laws, except that of asking from Congress (in case he should think fit to do so) such special compensation to the persons aggrieved, for the wrongs committed on them, as may be necessary to repair those wrongs, and to preserve the character and fulfil the obligations of the United States.

I have the honor, &c., &c.,

B. F. BUTLER.

To the PRESIDENT OF THE UNITED STATES.

POWER OF THE PRESIDENT TO EXPEL INTRUDERS FROM INDIAN LANDS.

The President has power to expel intruders from the lands secured to the Chickasaws east of the Mississippi by military force, if necessary.

ATTORNEY GENERAL'S OFFICE,

July 6, 1837.

SIR: The fourth section of the treaty made on the 19th of October, 1818, with the Chickasaw Indians, is in the following words: "The commissioners agree, on the further and particular application of the chiefs, and for the benefit of the

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poor and warriors of the said nation, that a tract of land, containing four miles square, to include a salt lick or springs, on or near the river Sandy, a branch of the Tennessee river, and within the land hereby ceded, be reserved, and to be laid off in a square or oblong, so as to include the best timber, at the option of their beloved chief, Levi Colbert, and Major James Brown, or either of them, who are hereby agents and trustees for the nation, to lease the said salt-lick or springs, on the following express condition, viz: For the benefit of this reservation, as before recited, the trustees or agents are bound to lease the said reservation to some citizen or citizens of the United States, for a reasonable quantity of salt, to be paid annually to the said nation for the use thereof; and that, from and after two years after the ratification of this treaty, no salt made at the works to be erected on this reservation shall be sold within the limits of the same for a higher price than one dollar per bushel of fifty pounds weight; on failure of which, the lease shall be forfeited, and the reservation revert to the United States."

It appears, from a memorial of the chiefs of the nation, addressed to the President of the United States, and dated the 10th of June, 1836, that the land above reserved was leased by the Indians to citizens of the United States, as required by the treaty; but that certain intruders have entered on the lands and dispossessed the lessees, who urge this as a reason for refusing to the Chickasaws the payment of the rent; and the memorialists, therefore, ask the President for relief.

Pursuant to the directions of the late President, I have examined the memorial and accompanying statement of W. B. Lewis, who was formerly interested in the lease; and have now the honor to state my opinion on the question whether the President has the power, under the existing laws, to dispossess the intruders by military force.

The fifth section of the act "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved March 30, 1802, enacts, "that, if any such citizen or other person shall make a settlement on any lands belonging, or secured, or granted, by treaty with the United States to any

Power of the President to Expel Intruders from Indian Lands.

Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months; and it shall, moreover, be lawful for the President of the United States to take such measures and to employ such military force as he may judge necessary to remove, from lands belonging or secured by treaty as aforesaid to any Indian tribe, any such citizen or other person who has made, or shall hereafter make, or attempt to make, a settlement thereon."

This section is yet in force, as it respects the Indian tribes residing east of the Mississippi; the act of 1802 being to that extent excepted from the general repealing clause inserted in the intercourse act of June, 1834. The Chickasaw tribe yet reside east of the Mississippi, and the provision therefore applies to the present case, provided the tract in question is to be regarded as lands "*belonging, or secured, or granted,* by treaty with the United States," to the Chickasaw tribe. The provisions of the article are not very explicit; but I think the tract may well be regarded as *secured* to the tribe or nation of Chickasaws. It was reserved for a national purpose, and is placed under the care of agents and trustees for the nation; and though the duration of the reservation is not defined, and though it is held on terms under which a forfeiture may, perhaps, already have occurred in favor of the United States, yet it seems to me but just to the Chickasaws to regard it as belonging to them until the United States think proper to enforce the forfeiture, and to treat the tract as a part of the public domain. This view is supported by the provisions inserted in the treaties of Pontotoc and Washington, but stricken out by the Senate, which recognise the right of the Chickasaws to this tract.

I am, therefore, of opinion that the question referred to me by the late President must be answered in the *affirmative*.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

TO the PRESIDENT OF THE UNITED STATES.

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Pre-emptions.

PRE-EMPTIONS.

A person who inhabited one quarter section and cultivated another, of which he was in possession on the 19th June, 1834, is entitled to enter the same after six months from the date of the act.

The option of entering either is lost only by neglecting to make the application within six months.

ATTORNEY GENERAL'S OFFICE,

July 10, 1837.

SIR: In the communication of the Solicitor of the General Land Office, enclosed to me in your letter of the 19th instant, the following case is stated: "On the 30th May, 1835, (under the act of June, 1834,) John B. Winchell was allowed to enter at Laporte, Indiana, the southwest quarter of section 4, township 35 north, 2 west; and Lyman P. Winchell the east half of southeast quarter section 5, township 35 north, 2 west. The proof filed by them shows that they entered upon the above lands, ploughed, fenced, and planted in corn twelve acres of the same during the year 1833, and continued to improve and cultivate, and were in possession until and on the 19th June, 1834. In 1833 they built a house in which they both lived during the whole period, (one being a single man and boarding with the other,) which, by the survey, is found to be one rod over the line, and on an adjoining section of public land."

The application not having been made within six months after the passage of the act of June 19, 1834, the parties are clearly not entitled to the option given by the second section of that act, which provides "that, where a person inhabits one quarter section and cultivates another, he shall be permitted to enter the one or the other, at his discretion: *Provided*, Such occupant shall designate, within six months from the passage of the act, the quarter section of which he claims the pre-emption under the same." The question then arises, whether they are entitled to a pre-emption of the tract cultivated in 1833, and possessed on the 19th of June, 1834. On this point I concur in the impressions of the Solicitor and Commissioner of the General Land Office, as stated in the papers referred to me. In my judgment, the loss of the special privilege given by the second section above quoted, by reason of an omission

Frauds upon the Creeks.

to designate within six months, does not impair the right of the settler to a pre-emption under the first section of the act, provided the requisites to such a right be fully made out. In the present case, the Messrs. Winchell, within the principles of my opinions in the case of Adams and Lapsley, were *settlers* and *occupants* of the lands applied for, although their dwelling-house was on a different tract; and the entry was, therefore, in my opinion, properly allowed by the district land officers.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEVI WOODBURY,

Secretary of the Treasury.

FRAUDS UPON THE CREEKS.

Sales by the Creeks, where purchasers, either by force or fraud, abstract from them the purchase money, are fraudulent and void.

So, also, are sales approved by the President where the reservee was personated by other Indians; and patents may be withheld.

ATTORNEY GENERAL'S OFFICE,

July 10, 1837.

SIR: In your letter of the 16th ultimo, you ask my opinion on certain questions submitted to your department in a communication of Messrs. Crawford and Balch, commissioners appointed by the President of the United States to investigate certain frauds alleged to have been practised on the Creek Indians.

These gentlemen state that, in the course of their examination, they find two classes of cases to which their attention has been anxiously directed:

1st. "Those in which, as it appears from unquestionable evidence before us, the money agreed to be paid to the reservees was paid in the presence of the certifying agents, and immediately thereafter taken back by force, or abstracted by fraud."

2d. "Those in which the true Indian never did sell his reserve, but another Indian was taken before the certifying agent,

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and there *personated* the true owner. A considerable number of these contracts have been *approved* by the late President of the United States, and a few of them *reversed* by him after he had approved them."

The commissioners desire to be advised as to the legal rights of the reservees, and of the purchasers from them, in the cases above stated; and also as to the proper course to be pursued in respect to them.

It is implied in the provisions contained in the third article of the treaty with the Creeks, that, whenever a contract of sale shall have been approved by the President, it shall be valid; and where the purchase has been made from the *actual reservee* for a *fair* consideration, honestly paid, the contract, on being approved by the President, will convey the whole right of the reservee to the purchaser, and will entitle the latter to a patent from the United States. But fraud vitiates every transaction; and every instrument which has been obtained thereby is considered, in the jurisprudence of civilized countries, as utterly null and void. If, therefore, the contract has been obtained by fraud, it would be set aside, on complaint of the party aggrieved, and proof of the facts, by any court of equity having competent jurisdiction, although approved of by the President; and, as the legal title remains in the United States until the issuing of the patent, which is an executive act, the President, when he has good reason to suspect that any such contract has been obtained by fraud, may lawfully withhold the patent until a judicial investigation can be had; or, if the proof of fraud presented to him be satisfactory, he may deny the patent to the fraudulent grantee, and issue it to such purchaser as shall comply in good faith with the provisions of the treaty, without subjecting the injured party to the delay and vexation of a suit.

The cases in which the late President *reversed* the contracts which he had previously approved, as mentioned by the commissioners, were undoubtedly of this latter description; and I do not doubt his authority to do so.

Both classes of cases stated by the commissioners are grossly fraudulent, and the principles above stated apply to them with their utmost force. The evidence in each of these cases should be fully reported to the President, with the opinion of the com-

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missioners as to its credibility and weight, so as to enable him to decide on the proper disposition to be made of each case.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

The Hon. J. R. POINSETT,

Secretary of War.

PAY OF ACTING QUARTERMASTER GENERAL.

The acting quartermaster general is entitled to receive the pay and emoluments of quartermaster general during the period of his service in that capacity, where the office is really or effectually vacant.

The proviso of the 5th section of the act of the 4th of July, 1836, to authorize the appointment of additional paymasters, and for other purposes, commented on and explained.

ATTORNEY GENERAL'S OFFICE,

July 11, 1837.

SIR: In your letter of the 29th of March last, enclosing a communication from the Second Comptroller, you ask my opinion on the question proposed by him as to the right of Major Cross, of the army, to claim and receive the pay and emoluments of quartermaster general for the period during which he acted in that capacity.

The state of the case, as it appears in the acts of Congress, and the communication of the Second Comptroller, and other documents before me, is as follows:

By the act of the 14th of April, 1818, the quartermaster general is entitled to the rank, pay, and emoluments of a brigadier general. General Thomas S. Jesup was several years ago duly commissioned as quartermaster general, and yet holds that commission. By virtue of ten years' service in the grade of brigadier general, he has been commissioned as a major general by brevet; and on the 20th May, 1836, he was assigned by the President to duty, according to his brevet rank, and ordered to take command of the troops of the United States and the militia that might be ordered into service to suppress the hostilities of the Creek Indians, and to proceed to Fort Mitchell, Alabama, there to assume command and the direction of affairs in that quarter.

Pay of Acting Quartermaster General.

Pursuant to the above order, General Jesup proceeded to the State of Alabama, and was detained in the Creek country until some time in the month of September last, when he moved, with the troops under his command, to Florida—where he yet is. From the time of his departure, under the order of the 20th of May, 1836, he has not performed (and, from the nature of the field duties assigned to him, could not perform) any of the duties of quartermaster general; and he has claimed and received the full pay and emoluments of a brevet major general. He has not received, nor does he claim, the compensation of quartermaster general since the 20th of May, 1836.

Prior to the 23d of July, 1836, the duties of the office of quartermaster general were performed, in the absence of General Jesup, by some officer other than Major Cross; but on that day the following appointment was made by the President: "Major Trueman Cross, quartermaster, is hereby appointed acting quartermaster general of the army during the absence of General Jesup, the quartermaster general, from the seat of government. This appointment to take place from the 23d day of July, 1836."

Pursuant to the above appointment, Major Cross immediately entered on the discharge of the duties of the office of quartermaster general, and has ever since acted in that capacity. Honorable testimony is borne in the papers before me to the fidelity and talent with which he has superintended the arduous and important concerns of the office; and the equity of his claim to receive the pay and emoluments attached to it is admitted by the Second Comptroller, and is too plain to need comment.

The army appropriation act of the 14th of May, 1836, contains an appropriation which includes the sum estimated for the pay and emoluments of a quartermaster general for the year 1836; and the like appropriation for the present year is included, on the like estimate, in the army appropriation law of the 1st of March, 1837.

As General Jesup has not received (and, by reason of the circumstances above stated, could not legally receive) the pay and emoluments of quartermaster general, the sums appropriated therefor by the acts of 1836 and 1837 must remain in the treas-

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ury, so far as respects the time for which Major Cross has performed the duties, unless he be legally entitled to receive them. In my opinion he is so entitled.

The only difficulty in the case is that which is supposed to be created by the proviso of the 5th section of the act of the 4th of July, 1836, "to authorize the appointment of additional paymasters, and for other purposes." This section is in the following words:

"SEC. 5. *And be it further enacted*, That, during the absence of the quartermaster general, or the chief of any other military bureau of the War Department, the President be authorized to empower some officer of the department or corps whose chief shall be absent, to take charge thereof, and to perform the duties of quartermaster general, or chief of the department or corps, as the case may be, during such absence: *Provided*, That no additional compensation be allowed therefor."

It must be acknowledged that this proviso is well calculated to excite doubts as to the authority of the accounting officers to allow the claim of Major Cross; but, after mature reflection on this subject, I cannot think it necessary so to construe the clause as to defeat the present claim.

As General Jesup was absent from the seat of government in discharge of the duties of his brevet rank of major general, and as the fact was one of public notoriety, it must be presumed that Congress were acquainted with it; and, if so, it must also, I think, be admitted that they had in view such an *absence* as then existed. Besides, as Major Cross received his appointment after the enactment of the law of 1836, and as that appointment speaks of the absence of the quartermaster general, and does not refer to any particular law, it is also a safe presumption that the President, in appointing him, intended to do it under the authority of the fifth section above quoted. Without inquiring, therefore, whether the appointment could or could not, after the act of 1836, have been made under any other authority; and, without entering into any inquiry as to the true meaning of the word "*absence*" used in the section, I agree that the appointment of Major Cross is to be regarded as made under the act of 1836; and that the proviso, therefore,

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applies to it. The whole question is then reduced to this: What is the true meaning of the proviso?

Did Congress intend that the officer who should be empowered to perform the duties of quartermaster general should not, under any circumstances, receive the compensation annexed to the office, even though the commissioned quartermaster general was so circumstanced as to be legally incapable of receiving it? The words do not import this; and, as such an intention is contrary to natural justice, it is not to be imputed to the law-maker, unless he plainly expresses it. The fair construction of the words used is, to forbid the allowing of any compensation, in consequence of the absence of the quartermaster general, and the empowering of another officer to perform his duties, in addition to the compensation already allowed by law for the performance of those duties; that is to say, the regular pay and emoluments of quartermaster general, as fixed by the standing law, and duly estimated and provided for by the army appropriation act. The proviso implies that a certain compensation is to be paid to somebody for the performance of those duties, because it merely prohibits the allowance of "*additional* compensation;" and, unless *some* compensation be allowed, there is nothing to which the thing prohibited can be *additional*; but does not attempt to determine to which of the two persons—the commissioned quartermaster general, or the officer empowered to act in his absence—the compensation allowed by law shall be paid. It leaves this to be determined by the circumstances of the case. If the absence of the quartermaster general be only temporary, and he be not employed in other official duties incompatible with the discharge of those which appertain to his office as quartermaster general, and for which he is legally entitled to receive, and does receive pay, he will be legally entitled to the pay and emoluments of the office of quartermaster general; and when *he* receives them, no *additional compensation* shall be allowed therefor. And in no event can more than one person be allowed compensation for performing the duties of the office. But, if the absence of the quartermaster general be of such a character as to deprive him of any legal right to demand and receive the compensation, I do not see why the general principle which applies in civil

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offices is not equally applicable here. When the head of any one of the executive departments is temporarily absent, the person who may act in his stead is regarded as a mere substitute for the incumbent, who alone is legally entitled to draw the salary; and as but one person can be paid for performing the duties of the office under a single general appropriation, the acting officer can receive no compensation for his services, unless by private arrangement with the incumbent, or by a special application to Congress. But where the office is entirely vacant, and a person is temporarily appointed to perform its duties, he is legally entitled, for the time being, to the salary annexed to the office. The office of quartermaster general was substantially in the condition of a vacant office when Major Cross was empowered to discharge its duties. General Jesup was then absent from the seat of government, in the discharge of public duties which he could not refuse, and which were utterly incompatible with the execution of the duties of quartermaster general. The office was not technically taken from him; but his power and right to exercise its functions and to demand its compensation, as well as his responsibility for its management, were suspended; and they will continue to be suspended until he shall be released from his duties in the line, when he will revert to his permanent office, become responsible for the discharge of its duties, and be entitled to its pay and emoluments.

For these reasons, I do not think the proviso under consideration ought to be so construed as to bar the claim of Major Cross to the pay and emoluments of quartermaster general.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PAY AND EMOLUMENTS OF OFFICERS OF THE MARINES.

By the application of the act of the 2d of March, 1827, to the marine corps, an assistant quartermaster of marines was entitled, prior to the 30th of June, 1834, to all the extra pay and emoluments and allowances allowed to an assistant quartermaster in the army similarly situated.

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A captain or subaltern in the command of a detachment of marines is entitled to receive the ten dollars per month as provided by the said act for the officer commanding a company in the army.

ATTORNEY GENERAL'S OFFICE,
July 11, 1839.

SIR: In your letter of the 20th of July last, you submitted to my consideration two letters from the Fourth Auditor and Second Comptroller, relating to the claims of Captain Nicholson, of the marine corps, as assistant quartermaster; and requested my opinion upon the following points presented by the Fourth Auditor:

1. "Whether, by the application of the act of the 2d of March, 1827, to the marine corps, an assistant quartermaster of marines was entitled, prior to the 30th of June, 1834, to all the extra pay, and emoluments, and allowances, as allowed to an assistant quartermaster in the army similarly situated?"

2. "Whether a captain or subaltern in the command of a *detachment* of marines is entitled to receive the ten dollars per month, as provided by the said act for the officer commanding a *company* in the army?"

The act of the 30th June, 1834, "making certain allowances, and granting certain arrearages, to captains and subalterns of the United States corps of marines," is in the following words:

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, the Secretary of the Navy be, and he is hereby, authorized to extend the benefits of the act of March, 1827, entitled 'An act giving certain compensation to the captains and subalterns of the army of the United States, in certain cases,' to the captains and subalterns of the corps of the United States marines, under similar cases.

"SEC. 2. *And be it further enacted*, That the Secretary of the Navy be, and he is hereby, authorized to cause to be settled, by the proper accounting officers of the department, all arrearages of pay and allowances which shall be found due the said captains and subalterns of the United States corps of ma-

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rines, from the period at which the act of March, 1827, above referred to, went into operation, up to the passage of this act; and that the same be paid out of any moneys in the treasury not otherwise appropriated."

Under these provisions, it appears to me that the first of the above questions must be answered in the *affirmative*: that is to say, that each captain and subaltern in the marine corps is to be allowed, from the 2d of March, 1827, to the 30th of June, 1834, one additional ration; except that this allowance cannot be given to subalterns in the marine corps for any time during which they may have been in the performance of any staff duties, for which they received extra compensation. This will place them on precisely the same footing as captains and subalterns in the army under similar cases.

The second question must also, in my opinion, be answered in the affirmative. The 1st section of the act of June 30, 1834, expressly extends the benefits of the act of March 2, 1827, to captains and subalterns of the marine corps, under similar cases to those provided in the act of March 2, 1827. The 2d section provides for allowing the arrearages of pay, as well as allowances, which may be found due to such captains and subalterns. But no pay was provided for in the act of 1827, except the \$10 per month given to the officer in the actual command of a company. The legal conclusion is therefore irresistible that Congress intended that this pay should be allowed to officers of the marine corps when having an actual command similar to that of a company in the army. Unless this construction be adopted, that part of the act which speaks of pay will be rendered entirely nugatory. It is also supported by the fact, that, in the act of 1798, organizing the marine corps, the words "company or detachment" are used as substantially synonymous.

It is very probable, I think, that the members of Congress who passed the act of June 30, 1834, may not have been personally acquainted with the fact stated by the Fourth Auditor—that assistant quartermasters and senior officers of the marine corps received the special allowance of \$15 per month; but the legal presumption is, that the legislature is perfectly acquainted

Rights of Residents and Visitors at the Military Academy.

with the existing public laws; and on this principle the act of 1834 must be interpreted.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

RIGHTS OF RESIDENTS AND VISITERS AT THE MILITARY ACADEMY.

No person has the right to enter the limits of the post at West Point, not even to visit the post office there, unless specially authorized by the laws of the United States, or by some officer having authority to grant permission.

Persons in civil life, residing permanently or temporarily at the post or occasionally resorting to the hotel, may be prevented by the superintendent of the academy from interrupting its discipline or obstructing in any way the performance of the duties assigned by law to the officers and cadets.

The commandant of the post may order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy; and he may be lawfully removed by force.

When, however, the United States have leased a dwelling-house within the post belonging to them, to an individual, they have no greater right than an individual would have in respect to ejectment of the lessee.

ATTORNEY GENERAL'S OFFICE,

July 13, 1837.

SIR: In your letter of the 10th of April last, you referred to me a communication from the Chief Engineer, with a report from the superintendent of the Military Academy, and certain accompanying papers, touching an order shortly before that time issued by the superintendent to Mr. W. B. Cozzens, of the West Point hotel, and the proceedings subsequently had thereon; and you requested my opinion on the points presented in those documents, relative to the rights of residents and visitors at the Military Academy.

The superintendent states, in the report above referred to, that circumstances connected with his recent order to Mr. Cozzens have produced, as he is told, "the expression of an opinion from high legal authority that the hotel, public wharf, and post office, located as they now are, confer upon all persons the right to come within the public boundary, and to remain during pleasure." This opinion, he states, is contrary to his own views; and he deems the existence of such a right en-

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tirely inconsistent with the interests of the academy. He also states that he has always regarded the citizens resident within the public limits—such as the sutler, keeper of the commons, tailor, shoemaker, artificers, &c., even though they own houses on the public grounds, or occupy buildings belonging to the United States, for which they pay rent to the post fund—as *tenants at will*, and liable to be removed whenever, in the opinion of the superintendent, the interests of the academy require it. “This,” he observes, “has been the practice since I have been in command; and such, I am told, was the usage under the administration of my predecessors.”

In a subsequent communication from the superintendent, the case of one Avery is stated, who is in possession of a part of the public land originally allowed to be gratuitously occupied by one McClelland and his wife during their lives, and to the occupancy of which Avery, as the son-in-law of McClelland; has succeeded. McClelland himself is dead, but his wife is yet living, and resides with Avery, who, it appears, now claims title to the premises; and in virtue of this claim, has cut down, carried away, and sold, a considerable quantity of the wood growing thereon. The superintendent has applied to the district attorney of the United States for the southern district of New York to institute legal proceedings; which, however, at the date of the superintendent's report, had not been done. In the mean time, it is stated by the superintendent, that on the 13th of May last he gave directions to the officer charged with the police of the post not to permit Avery to come on it again, and to warn him of the same, and that he would be dealt with accordingly; which was done. That, a day or two after, Avery (acting, as is said, under legal advice) came within the ceded jurisdiction—that is, the post of West Point—under pretence of the *right* of all citizens to go to the post office and to the hotel, at both of which places he transacted, or pretended to transact, business; after which, the police guard of the post took him, and put him over the river on the nearest point of land, turning his horse loose at the public gate. A private action has been brought by Avery against the superintendent for some alleged cause growing out of these transactions; and the subject connects itself with the points presented in the first

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mentioned communication. In your letter of the 26th of May, you also ask my opinion whether Avery has acquired any right in the property on which he resides?

In regard to this latter question, I think, upon the facts stated by the superintendent, there is little or no room for doubt. If the land occupied by Avery was a part of the public domain at the time when McClelland was suffered to take possession; and if McClelland, his wife, and Avery, have ever since been regarded by the officers of the United States as mere tenants at will; and if no claim of title was ever set up by either, until the recent attempt by Avery to exercise acts of ownership, it will be impossible that the pretence of title now set up by him should succeed. The United States are entitled to recover the possession of the premises in an action of ejectment, and, until the determination of such action, they may obtain an injunction to stay the commission of any further waste by Avery, or persons employed by him; and the Solicitor of the Treasury, on being applied to by the department, will no doubt direct the proper proceedings to be instituted by the district attorney.

The general question submitted to me is one of greater difficulty. The tract of land including the military post of West Point is not only owned by the United States, but the jurisdiction over it was ceded by an act of the legislature of the State of New York, passed March 2, 1826, to the United States, with the single reservation that the cession should not prevent the execution of process, civil or criminal, under the authority of the State of New York, except so far as such process may affect the real or personal property of the United States within the tract. This reservation was, no doubt, made with a view to prevent the ceded territory from becoming a sanctuary for debtors and criminals; but, in all other respects, the ceded territory, and the persons and things within it, are subject, under the authority of the United States, to the exclusive legislation, in all cases whatsoever, of the Congress of the United States. The persons actually inhabiting it, who belong to the army of the United States, or who are so connected with the army as to be subject to the rules and articles of war, may be governed and controlled by the superintendent as commandant of the post, in like manner as other portions of the army at other posts.

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Other persons, not subject to the rules and articles of war, will, of course, be entitled to all the rights of citizens, except so far as those rights are necessarily modified by the military purposes for which the territory is held by the United States, and by the exigencies of the public service. Congress have passed no laws regulating the rights and liabilities of such persons in places of this description; nor are there any judicial decisions which shed much light on the subject; we are, therefore, obliged to settle them by analogy, or by deductions from the nature and reason of the case. Guided by these considerations, I have been led to the conclusion that no person can be entitled, as a matter of right, to enter within the limits of this post, unless he be authorized to do so by the laws of the United States, or by some officer having authority under the laws to grant permission to enter such limits. The fact that there is a post office within the limits of the post, cannot, in my opinion, entitle persons not residing within those limits to visit the post office without permission of the superintendent. The post office is principally designed for the accommodation of persons connected with the post, and no others have any legal right, except by permission of the commandant, to resort to it. This limitation of what, in ordinary cases, is an undoubted right of the citizen, is indispensable to the preservation of military discipline, and, in my judgment, results from the special use to which the government has constitutionally appropriated the ceded tract.

The like observations apply with increased force to the public wharf, and still more emphatically to the hotel. The excise laws of the State of New York, under which hotels in that State are usually licensed, and by virtue of which all persons conducting themselves with propriety have a right to resort to them, do not apply to this establishment; and the police of the post may undoubtedly be extended to it, not only in respect to the military and other persons attached to the post, but so far as to prevent any person, or class of persons, not connected with the academy, from residing at or resorting to it, if, in the judgment of the superintendent, such a measure is required by the true interest of the service.

In regard to persons in civil life residing permanently or tem-

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porarily at the post, or occasionally resorting to the hotel, I am of opinion that the superintendent of the academy, as commandant of this military post, has a general authority to prevent any person within its limits from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. All such persons are allowed to come within the bounds of the post, under an implied engagement on their parts to respect the military authority legally established there, and to abstain from any act which may interfere with the purposes and regulations of the post. If this engagement be violated, they must be considered as wrongdoers; and the commandant will have a right to take such measures as may be necessary to protect the interests of the establishment. It is obvious that, when persons in civil life, who may be allowed to reside at or to resort to the post, obstruct the professors or their officers in the performance of their appropriate duties; or interfere with the studies or discipline of the academy; or encourage the cadets in acts of insubordination; or enter into correspondence with them, contrary to the regulation, their further presence at the post will become, according to the nature of the circumstances and the degree of aggravation, more or less injurious to the institution; and that, in flagrant cases of this sort, the prompt removal of the offenders may be indispensable. As they will not be amenable to a court martial, there is no other way in which the ill consequences which might otherwise result from such misconduct can be prevented. In the exercise of a sound discretion, the commandant of the post may, therefore, order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy. And, in case any person so ordered shall refuse to depart, after reasonable notice, and within a reasonable time, having regard to the circumstances of the case, I think the superintendent may lawfully remove him by force. The general power above stated will, however, be qualified, in the case of the postmaster, by the commission which he has received, which entitles him to remain until removed from office by the Postmaster General; and it will also be qualified in respect to tenants of buildings owned by the United States, by the nature of the agreement,

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express or implied, under which they may hold possession of such buildings. The United States have the same power to lease a dwelling house belonging to them, which is possessed by an individual; and they have no greater right than an individual would have in the ejectment of their lessee. In every such case regard must be had to the peculiar nature of the tenancy, and to the rights and obligations which result from it; and the occupant will be entitled to the same notice to quit, where such a notice is secured by the general rules of law, as any other tenant. And the law of the State of New York, although not primarily in force in the ceded tract, will be resorted to as the rule of decision—*first*, because Congress have passed no special law on the subject; and, *secondly*, because the 34th section of the judiciary act of 1789 provides “that the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.”

But although the power of the military commandant to remove a person guilty of misconduct from the possession of a building may thus be modified by his official character, or by the nature of the tenancy, I think there can be no doubt of his authority to exclude such person, in the mean time, from access to any part of the post not essential to the use of the building he may occupy, and to his ingress and egress to and from it. His general powers, were they not modified by circumstances, would enable him to remove the party altogether; the modification of those powers will be only coextensive with such circumstances, and with the rights which grow out of them.

In regard to the particular case of Mr. Cozzens, I have not before me such a statement of facts as to enable me to decide on the validity of the order addressed to, or of the claim made by, him.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

VOL. III—18

Duty of the Executive respecting Sales of Public Lands.

DUTY OF THE EXECUTIVE RESPECTING SALES OF PUBLIC LANDS.

It is the duty of the Executive to secure to all persons a fair and equal opportunity of purchasing the public lands.

Lands that have been temporarily withheld from private sale should not be allowed to be entered until suitable notice has been given of the removal of the cause of suspension, unless applied for before suspension.

The Treasury Department has no authority to require a certificate that notice has been given, or that lands are liable to entry; nor can the Treasurer refuse pay for a specific tract, unless he have official evidence that it is not subject to sale.

If any good cause be known to the register, he may refuse to complete the entry.

ATTORNEY GENERAL'S OFFICE,
July 14, 1837.

SIR: In your letter of the 15th of February last, and the enclosed communication from the Commissioner of the General Land Office, the three following questions are proposed for my opinion:

“1. Whether lands intentionally withheld from private entry, in order to enable the proper authorities to consummate their action in reference to reservations to be made under treaties with the Indians, will, so soon as released from the temporary withdrawal, be subject to private sale; or whether the like notice is first to be given, as provided in the ninth regulation of the circular of instructions of the General Land Office of the 1st of January, 1836, in respect to lands improperly withheld from private entry.”

“2. Whether the department, under the above-named regulations, and its general powers, and the act of the 24th of April, 1820, can interdict the sale of lands which have been offered at public sale, but which have been suspended from private entry for special cause, until timely notice has been given that that cause of suspension has been removed, and that private entries will be received.”

“3. Whether the department can require from persons offering to make payments at the treasury a certificate from the land officers that such notice has been given, and that the lands are subject to private entry accordingly; or, in all cases, that the lands are subject to entry.”

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The ninth regulation contained in the circular of the 1st of January, 1836, is in the following words:

"9th. Whenever you have reason to believe that any tract or tracts in your district, heretofore offered at public sale, may have been improperly withheld from private entry in consequence of errors in your books, or in marking the sales upon your maps, or from any other cause whatever, you will seek information from this office in relation to such cases; and if it should then appear that the lands have been thus erroneously withheld from private entry, you are particularly required to give notice of the fact, by public advertisement, in the most convenient newspaper, and to be put up in suitable places setting forth that, at a particular hour and day therein to be mentioned, you will be prepared to receive applications to enter the lands designated in such notice.

"This notice should be given at least *thirty days* before entries are to be received; and in no event will you allow any such lands to be entered or located before the expiration of the time thus prescribed."

In order to give a correct reply to the above questions, it is first necessary to inquire into the validity of this regulation.

No power to make it is expressly given to the Commissioner of the General Land Office by any act of Congress. I think, however, it is well warranted by the nature of the case and the general powers of the Executive under the constitution.

The 3d and 4th sections of the act of the 24th of April, 1820, enact that the public and reverted lands of the United States, which shall have been offered at public sale according to law, and which shall remain unsold at the close of such public sale, "shall be subject to be sold at private sale by entry at the land office."

It is the duty of the Commissioner of the General Land Office, under the general supervision of the Secretary of the Treasury, and through him of the President, to take care that this law is faithfully executed.

One of the most important points to be observed in the execution of the law, is the securing to all persons a fair and equal opportunity to become purchasers of the public lands. Such an opportunity will always be secured to the community when

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the regular course is pursued; the President's proclamation designating the general tract, and the law providing that all the offered lands which shall remain unsold at the close of the public sale shall be subject to private entry.

Where lands subject by law to private entry have been improperly withheld therefrom, it is no doubt the duty of the proper executive officers, whenever they become acquainted with the fact, to take measures for complying with the law.

It is obvious, however, that to bring such lands into market, especially if considerable time has elapsed since the close of the public sale, and to allow them to be entered by any particular individual, before public notice has been given that they are subject to private entry, would, in most cases, give to such individual a preference over the rest of the community. Such a course would not be a faithful execution of the law; and I think, therefore, that the regulation above quoted is a reasonable and legal exercise of the general supervisory powers possessed by the department.

The lands described in your first and second questions appear to me to come within the reason of the above general regulation; and I am accordingly of opinion that they may lawfully be withheld from private sale until such timely notice can be given as to prevent undue preferences, and to secure the equal operation of the law authorizing the sale.

To prevent misapprehension, it is proper to observe that I understand these two questions to relate to lands not applied for at private sale until after such lands had been for some time *suspended* from private sale; and the above opinion must be received with this limitation.

If the land be really liable to private entry, and be applied for immediately after the close of the public sale, and before any formal suspension from private entry has taken place, and the applicant takes the proper steps to follow up his application, justice requires that his purchase should be completed, notwithstanding any subsequent suspension.

In such a case there is no propriety in giving public notice, when the cause of suspension no longer exists, that the land is liable to private entry: the public are not entitled to offer for it; it has already been selected by an individual who is entitled

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to the benefit of his legal diligence; and nothing remains except to complete his purchase.

I doubt the power of the department to require from persons offering to make payments at the treasury, such a certificate as either of those mentioned in the third question.

If the party offers to make payment to the treasurer for any specific or designated tract, I do not see how that officer can well refuse it, unless, indeed, he has in his possession some official evidence showing that the designated tract is not subject to private entry. But, notwithstanding the payment to the treasurer, I think the register of the land office may lawfully refuse to allow the entry when the application therefor shall be made to him, if any legal objection to it then exists.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY,
Secretary of the Treasury.

POWER OF THE PRESIDENT OVER MINERAL LANDS IN WISCONSIN.

The President has the power to reserve from public sale any or all of certain mineral lands in Wisconsin, and may, if he deem it advisable, lease them.

Where, from want of proper and necessary information, he shall have failed to make the necessary reservation prior to the public sale, it is competent for him then to direct the reservation.

Citizens cannot acquire a right to enter lands which have been improperly withheld from private entry, after the close of a public sale at which they were offered, until after notice.

ATTORNEY GENERAL'S OFFICE,
July 21, 1837.

SIR: In the report of the Solicitor of the General Land Office, in relation to the lead mines in the Wisconsin Territory, enclosed by the Commissioner, and referred to me for my opinion by your letter of the 23d ultimo, the following questions are proposed:

“1st. Does the act of the 26th of June, 1834, authorize the sale of the mineral lands in Wisconsin?”

“2d. Had not the President the right to *reserve* from public

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sale all the mineral lands, and such necessary timber lands as were called for by the leases to smelters and others?"

"3d. Has he not yet the right to lease them, if he shall think that course desirable?"

"4th. In cases where, from want of proper and necessary information, he had failed to make the necessary reservation prior to the public sale, was it not competent for him to direct the reservation?"

"5th. When lands were improperly withheld from private entry subsequently to the close of a public sale at which they were offered, can a citizen acquire a right to enter, notwithstanding the rule of the office prohibiting a sale until after notice, &c.?"

The three first of these questions may most conveniently be answered together.

In my opinion, the fourth section of the act of the 26th of June, 1834, *authorized* the President (in his discretion) to offer for sale, in the manner prescribed by law, and in connexion with other lands, any mineral lands situated within the several land districts created by the first section of that act, except where such mineral lands were embraced by any of the exceptions specified in the fourth section; but did not require him to cause the same to be offered for sale.

I think, therefore, the President had the power to reserve from public sale any or all such mineral lands, and that he may lease them under the act of the 3d of March, 1807, if he shall think that course advisable.

The fourth section of the act of 1834 excepts, among others, "such tracts as have been granted to individuals;" the liberal construction of which phrase may well be regarded as including all mineral tracts and necessary timber lands leased to smelters and others. On this construction of the exception, the President has not only the power, but it is his duty to reserve from sale the lands described in unexpired leases executed by him; and, independently of the exception, I think he has this power, and that good faith to the lessees requires its exercise.

The fourth question, in my opinion, must be answered in the *affirmative*.

Payment of Debenture Certificates.

There is nothing in the act of 1834, or in any of the acts to which it refers, that can prevent the correction of a mistake of this nature; and as the President is to take care that the laws are faithfully executed, it will be his duty to direct the reservation whenever he shall become acquainted with the facts which make it necessary.

To the fifth question, I reply in the *negative*; and beg leave to refer, for the grounds of my reply, to the opinion given by me on the 14th instant, in answer to a similar question.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

PAYMENT OF DEBENTURE CERTIFICATES.

The collector of customs ought not to refuse payment of a debenture certificate, and in lieu thereof give credit on the extended bond where the party to whom the certificate may have been issued, received an extension of payment on bonds given to secure the duties on a subsequent importation of goods; nor where the certificate came into possession of the party by endorsement or assignment.

ATTORNEY GENERAL'S OFFICE,
July 24, 1837.

SIR: In your letter of the 14th instant, you inform me that cases frequently occur where merchants who have obtained an extension of payment on their duty bonds, demand payment in specie of debenture certificates that have subsequently become due; and you therefore request my opinion on the following points, growing out of this state of things:

1. "In a case where the party to whom a debenture certificate may have been issued under the provisions of the 80th section of the act 'to regulate the collection of duties on imports and tonnage,' approved the 2d of March, 1799, receives an extension of payment on bonds given to secure the duties on a subsequent importation of goods, whether the collector would be justified in refusing the payment of such certificate, and, in lieu thereof, giving a credit for its amount, by an endorsement on the extended bond before mentioned?"

 Compensation to Owners of Vessels Transporting Indians.

2. "Whether the acts stated in the first inquiry can be done by the collector in cases where the debenture certificate held by the party does not purport to be issued to himself, but came into his possession by endorsement or assignment?"

In my opinion, both the above questions must be answered in the *negative*, except as to those cases where the extension of payment on the duty bond has been granted on the express condition that such debenture certificates shall be paid, when they become due, by being credited on the duty bond.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

 COMPENSATION TO OWNERS OF VESSELS CHARTERED TO
TRANSPORT INDIANS.

The owners of vessels chartered for the purpose of transporting Indians from Florida, but not employed for that purpose, are legally entitled to the stipulated demurrage and the actual damage occasioned by the non-fulfilment of the contracts.

ATTORNEY GENERAL'S OFFICE,
July 27, 1837.

SIR: In answer to the question proposed to me in your letter of the 17th instant, I have the honor to inform you that I concur in the opinion expressed by the Second Comptroller in the communication enclosed in your letter, viz: that the owners of vessels chartered for the purpose of transporting Indians from Florida, but not employed for that purpose, are legally entitled, in addition to the stipulated demurrage for the time they are detained, to the actual damage sustained by them in consequence of the non-fulfilment of the contracts—not exceeding, however, in any case, the stipulated freight, if the contract had been executed. The mode of ascertaining the proper amount of compensation in cases of this sort is by agreement of the parties; and, if that be impracticable, by referring it to a jury, who will form their estimate upon a consideration of all the circumstances of the case. As the government cannot be sued, and the parties ought not to be driven to apply to Congress,

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except when such a course is unavoidable, it will be proper for the department to propose equitable terms of settlement in these cases, and when such terms can be agreed on, to carry them into effect. In accomplishing this purpose, it may lawfully adopt any general rule of damages which it shall believe just; and none appears to be more equitable to both parties, than that suggested by the acting quartermaster general, viz: a continuous demurrage to the time of discharge, in all ordinary cases. But where the contract was a favorable one to the owner, and likely to yield a profit, such an allowance might not be sufficient to make good his real loss; and, if so, he certainly could not be required to take up with it.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

SURVEYS OF THE PUBLIC LANDS.

The act of 24th April, 1820, and the instructions issued under it, directing the manner of subdividing fractional sections containing over 160 acres, did not require the absolute platting of every quarter or half-quarter of which the section was susceptible; but contemplated the exercise of discretion so as to prevent small and inconvenient fractions of a fractional section.

It is the duty of surveyors general to subdivide fractional sections in conformity to law, and without reference to the existence of the pre-emption acts of May 29, 1830, and June 19, 1834.

ATTORNEY GENERAL'S OFFICE,

August 2, 1837.

SIR: In your letter of the 14th of June last, you requested my opinion on certain points presented to you by appeal from the Commissioner of the General Land Office, relating to the legality of the survey heretofore made, and adopted by the General Land Office, of the divisions of fractional section 22, township 4, range 1 west, in St. Stephen's land district.

It appears from the papers accompanying your letter that section 22 was made fractional by private claims, and that it contained about 203 acres, lying in such a form as to admit the running out of one complete quarter section, and, of course, of two complete half-quarter sections. Such a division, however,

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would have left two small irregular and inconvenient fractional tracts, being parts of three fractional quarter sections. To prevent this, the surveyor general divided the section into only two parts, by running a line due north from the half-quarter section post: thus making two tracts of a compact and convenient form, each approaching as nearly to the form and contents of a half-quarter section as was practicable, supposing the object of the survey to be to divide the section into tracts of this form, in such way as to avoid the leaving of small fractional remainders.

James Etheridge had previously claimed and proved a pre-emption right, under the act of 1830, to the southwest quarter of this section; and W. D. Stone the like right to the fraction in the west part of the southeast quarter; and after the above-mentioned survey came in, they respectively paid, and received certificates—Etheridge for the southwest subdivision of 92.67 acres, and Stone for the southeast subdivision of 110.50 acres; in conformity to which, patents have since been issued. Etheridge, however, insists that, as there was an entire quarter section of 160 acres, and he the only settler thereon, he was legally entitled to enter such a division; that he took the proper steps to perfect this right; that the survey, disregarding the quarter-section lines, was illegal; and that it ought to be corrected by subdividing the section agreeably to those lines. This would enable him to obtain his whole pre-emption rights, but would leave the small fractional remainders above stated.

The single question, on which it now appears to be material that I should express an opinion, is as to the duty of the surveyor general to divide the section into regular half quarter sections. In deciding this question, I have thought it useful to examine the provisions of the several acts of Congress relating to the survey of the public lands, commencing with the act of the 18th May, 1796, and ending, so far as regards the present case, with the act of the 24th of April, 1820, (all which acts are *in pari materia*;) but I think its solution depends on the first section of the latter act, and on the instructions of the Secretary of the Treasury issued in pursuance thereof.

The first section of the act of 1820 provides that the public lands of the United States, when offered at public sale, shall

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be offered in half-quarter sections; that when offered at private sale, they may be purchased (at the option of the purchaser) either in entire sections, half sections, quarter sections, or half-quarter sections; that in every case of the division of a quarter section, the line for such division shall run north and south; and the corners and contents of half quarter sections be ascertained in the manner directed and prescribed in the act of the 11th of February, 1805; and that "fractional sections containing 160 acres or upwards shall, in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections containing less than 160 acres shall not be divided, but shall be sold entire." Under this latter clause, the Secretary of the Treasury, on the 10th of June, 1820, issued instructions directing that fractional sections containing more than 160 acres should be "divided into half quarter sections by north-and-south or east-and-west lines, so as to preserve the most compact and convenient forms."

This instruction, as I am informed, has been understood in the General Land Office, and by the surveyors, to authorize the course adopted by the surveyor general in the present case; and I shall assume that it did so. I make this assumption, because the department is perfectly competent, and best qualified, to construe its own instruction; and because, unless such was its meaning, no question of law under the act of 1820 could well arise for my consideration; for if the instruction required, as contended by the counsel of Mr. Etheridge, that all the regular half quarter sections of which the fractional section is susceptible shall be actually formed, then the survey should have been set aside for its non-conformity to the instruction.

The matter is then narrowed to the question—Whether the instruction of 1820 (construing it as the surveyor general has done in the present case) is a legal and valid exercise of the discretion committed to the Secretary of the Treasury by the act of the 24th of April, 1820, above quoted? It will readily occur, that to authorize me to pronounce an instruction of this nature, issued immediately after the enactment of the law, and acted on for so long a period, illegal, the objection should be a very clear one. This is by no means the case in the present

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instance; and, after mature consideration, I am led to answer the question just stated in the *affirmative*, for the three following reasons:

1. If Congress had intended that fractional sections should, at all events, be divided into half-quarter sections, when their shape admits the formation of any such subdivision, I think they would have said so in explicit terms, and that the discretionary power intrusted to the Secretary would have been plainly confined to the residuary parts of the section.

2. The clause in the first section of the act of 1820, concerning fractional sections containing less than 160 acres, (which are not to be divided at all, but sold entire,) is decisive to show that the Congress which passed that act did not deem it indispensable that regular half quarter sections should in all practicable cases be formed by the surveyors; on the contrary, it shows that they preferred a single tract, though containing more than eighty acres, and though capable of forming a regular half quarter and small and inconvenient fractions.

3. I am of opinion that the survey should be made in conformity to the general system established by law, and by the instructions of the department, without any reference whatever to the existence of a pre-emption law, or to the fact that rights have been claimed and established under it.

I am, sir, very respectfully, your obedient servant,

B. F. BUTLER.

HON. LEVI WOODBURY,

Secretary of the Treasury.

SURVEYS AND ENTRIES OF PUBLIC LANDS.

It is the duty of surveyors general to divide fractional sections containing over 160 acres into lots approaching as nearly as practicable to the form and quantity of half-quarter sections; and it is competent for the department to direct the performance of the duty.

The survey is to be made without reference to pre-emptions, but pre-emptors are entitled to a legal survey.

A tender for more than the party is entitled to, does not destroy the tender; it may be regarded as precautionary.

Surveys and Entries of Public Lands.

It is proper, after tender made and entry defeated by fault of the officers of the government, to correct the error by ordering a correct course of procedure.

ATTORNEY GENERAL'S OFFICE,
August 5, 1837.

SIR: In compliance with the request contained in your letter of the — ultimo, I have looked into the additional report of the Commissioner of the General Land Office in the case of Brown and Reynolds, bearing date the 29th of June last; and, upon the additional facts mentioned therein, have the honor to state the following propositions as the result of further reflection on this case:

1. Under the act of 1820, and the instructions issued by virtue thereof, it was the duty of the surveyor general to divide fractional section 20, containing, as it does, more than one hundred and sixty acres, into lots or tracts of a compact and convenient form, approaching as nearly as practicable, having regard to the shape of the whole fractional section, to the form and contents of half-quarter sections.

The reasons on which this opinion is founded will appear in my opinion of the 2d instant, in the case of James Etheridge; to which I beg leave to refer.

2. I suppose it to be competent for the department to cause the surveyor general now to do what he ought to have done when he made the survey; and that it is the duty of the department so to direct, if such a course be necessary to the protection of any right duly claimed under the pre-emption laws or otherwise. For, although the surveyor general is to be guided in the performance of his duty exclusively by the laws and instructions relating to surveys, and is to execute that duty without reference to its possible effects on pre-emption claims; yet, where a pre-emption claim exists, and has been duly established, the party is clearly entitled to the benefit of a survey made in conformity to law.

3. It appears to me that the designation of Reynolds, entered in the abstract of the land officers, was sufficiently precise to entitle him to take his floating right in the west part of fractional section 20, including the small tract now marked E; provided, by the survey thereafter to be made, a division should be legally formed, embracing tract E, and liable, according to

the rules stated in my opinion of the 27th of April last, to be taken under a floating right.

4. I am also of opinion that, as the survey was erroneous in not dividing fractional section 20 into lots or tracts of a compact and convenient form, approaching as nearly as might be to the form and contents of half-quarter sections, and as Reynolds could not control or alter that survey, his tender for tract A, of 149 acres, ought not to be regarded as a claim to the whole, and to no less than the whole, of that tract; but rather as applying to the whole, if by law he was entitled to purchase the whole; and if not, then to so much of it, if any, as the law would entitle him to purchase by virtue of his floating right; and I think the affidavit of Reynolds, made on the 3d of March, 1836, and the other proceedings on his part, reconcilable with this view of the subject.

5. It will follow from the foregoing propositions that the course proposed by the Commissioner of the General Land Office, viz: to allow Reynolds to complete his purchase to the tract marked E, may properly be adopted, provided tract E could have been made, or can now be made, under the act of 1820, a legal subdivision of fractional section 20; but if not, and any portion of tract A, including tract E, could have been made, and can now be made, under the act of 1820, a legal subdivision of the section, then I think Reynolds should be allowed to complete his purchase to such larger subdivision, provided it be not so large, when added to the tract selected by Brown for his float, as to exceed in the aggregate 160 acres.

Some other questions have been raised by Mr. Sherman, in his observations addressed to me on the report of the Commissioner; but as they were not presented by your communication, I have not deemed it proper to examine them; nor, if you concur in the views above stated, will you probably find it material to do so.

I have the honor to be, very respectfully, your obedient servant,

B. F. BUTLER.

To the Hon. LEVI WOODBURY,

Secretary of the Treasury.

Application of Assets of a Copartnership.

INSTITUTION OF MARRIAGE IN NEW YORK.

Marriage, so far as its validity in law is concerned, in New York is considered as a civil contract; no formal solemnization by a minister, or any particular officer, being requisite.

ATTORNEY GENERAL'S OFFICE,
August 18, 1837.

SIR: In answer to the question proposed in the papers referred to me by your letter of the 11th instant, I have the honor to inform you that, in the State of New York, marriage, so far as its validity in law is concerned, is considered as a civil contract; that no formal solemnization by a minister of religion, or by any particular officer, is requisite; and that a contract of marriage entered into by parties capable of contracting, in the presence of an officer in camp, or of any other competent witness, is as valid as if made *in facie ecclesie*, or in the presence of a civil magistrate. This was during the revolutionary war, and yet continues to be, the law of the State.

I am sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

APPLICATION OF ASSETS OF A COPARTNERSHIP.

It is a settled rule, that the assets of a partnership are not to be applied to the payment of the private debts of either partner, until after the partnership debts are discharged; and this is more emphatically the case where the private debts were contracted after the dissolution.

ATTORNEY GENERAL'S OFFICE,
August 26, 1837.

SIR: As it appears from your communication of the 21st instant, and the papers enclosed in it, that the custom-house bonds of Fortescue Whittle were given after the dissolution of the firm of C. and F. Whittle; and that the debt to Mr. McIntosh was contracted by the firm during the partnership, and was due at its dissolution, he is clearly entitled to be paid the full amount of that debt. It is a settled rule, that the assets of a partnership are not to be applied to the payment of the pri-

Patents for Creek Reservations.

vate debts of either partner, until after the partnership debts are first discharged; and this is more emphatically the case where such private debts were contracted after the dissolution.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PATENTS FOR CREEK RESERVATIONS.

Patents may issue directly to a white person being the assignee of a Creek reserve, to whom the tribe had assigned a portion of the twenty-nine sections reserved under the 6th article of the Creek treaty of 1832.

OFFICE OF THE ATTORNEY GENERAL,

August 28, 1837.

SIR: In your letter of the 18th instant, you enclose certain papers from the General Land Office, in relation to five sections of land, assigned by the Creek tribe to the western Creeks, under the sixth article of the treaty of 1832, and sold by those assignees, with the approbation of the President, to Messrs. Stewart, Fontaine, & Hargrave, and which present, as stated by the Solicitor of the General Land Office, the following question; on which you ask my opinion:

“Under the sixth article of the Creek treaty of 1832, some of the Creeks to whom the tribe assigned a portion of the twenty-nine sections reserved under the sixth article have sold their reserves to white persons, with the approbation of the President. Under this state of facts, may not patents issue to such white persons, in the manner provided by the third article of the treaty?”

In my opinion of the 15th of April, 1834, transmitted to the War Department, I examined several questions arising under this article, and relating to this consequence. In the course of my remarks, it was suggested that the patents for the twenty-nine sections could only be issued to the Creek assignees. This point, however, was not then presented for decision, and I have since had reason to doubt the accuracy of the suggestion referred to. Under this impression, I called the attention of the Solicitor of the General Land Office to the point; and

Medical Assistant of Exploring Expedition.

since it has now been distinctly referred to me for my opinion, I have the honor to inform you that, in my judgment, the question proposed by him should be answered in the affirmative, for the general reasons assigned by him.

I am, sir, &c.,

B. F. BUTLER.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

MEDICAL ASSISTANT OF EXPLORING EXPEDITION.

The arrangements for this expedition being at the discretion of the President, he may appoint and employ a medical assistant thereto without the formality of an examination and approval by the board of surgeons.

ATTORNEY GENERAL'S OFFICE,
October 5, 1837.

SIR: In answer to the question "whether a medical assistant to the surveying and exploring expedition may be appointed and employed, without examination and approval by the board of surgeons, as provided in the act of the 24th of May, 1828, and without such person being commissioned as assistant surgeon in the navy," I have the honor to inform you that, after a careful examination of the acts of Congress organizing the Navy Department, and authorizing the sending out of said expedition, I am of opinion that such medical assistant may be appointed, provided the President shall deem it expedient and necessary.

Since the passage of the act of the 24th of May, 1828, no person can be appointed an assistant surgeon in the navy, who has not first been examined and approved, as required by the act. But, whenever special medical assistance is required in any particular branch of the naval service, and the President shall think it inexpedient to enlarge the number of commissioned surgeons or assistant surgeons, I perceive no objection to the temporary employment of medical assistants. Such persons will not be regarded as belonging to the navy; they will not be entitled to pensions if disabled, nor will their families be entitled to them in case of death. It may, therefore, be found

Concerning the Washington Canal Company.

advantageous to employ them, for temporary service, when the list of commissioned surgeons and assistant surgeons does not afford the needful supply. This course may be adopted, I presume, whenever the public service requires it; and especially in reference to the proposed expedition, the whole arrangement of which seems to be committed to the discretion of the President.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

CONCERNING THE WASHINGTON CANAL COMPANY.

The Secretary of the Treasury may give to the corporation of the city of Washington the certificate described in the seventh section of the act vesting in that corporation the rights of the said company and for other purposes, passed May 31, 1832, notwithstanding the work was not completed by the 1st March, 1833; provided the work has been finished in the manner prescribed and the time when it was completed be actually stated.

ATTORNEY GENERAL'S OFFICE,

November 7, 1837.

SIR: I have duly considered the question proposed to me in your letters of the 3d and 10th ultimo, relative to the authority of the Secretary of the Treasury to give to the corporation of the city of Washington the certificate described in the seventh section of the act vesting in that corporation "the rights of the Washington Canal Company, and for other purposes," passed May 31, 1832, notwithstanding the conceded fact that the work was not finished by the 1st of March, 1833, as required by the second section of said act; and have the honor to inform you that, in my opinion, there can be no objection to the giving of such certificate provided the work has been finished in the manner prescribed, and provided, also, the real time when the work was completed be stated in the certificate.

I am inclined to think that the additional act of March 2, 1833, must be regarded as a legislative waiver of the condition prescribed in the former law, and as granting an indefinite period for the completion of the work; and that the rights of the

Pensions from the Navy Pension Fund.

corporation will, therefore, be unimpaired by the delay which has occurred. But, as there may be some room for doubt on this point, and as the certificate should conform to the truth of the case, I recommend the form above suggested. Such a form, if the law of 1833 operates to enlarge the time, will be all that the corporation can need; and if, on the other hand, it does not so operate, they have no right to call on the Secretary of the Treasury to relieve them, but, of necessity, must ask the intervention of Congress.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PENSIONS FROM THE NAVY PENSION FUND.

The second section of the act of 3d March, 1837, for the more equitable administration of the navy pension fund, adopts the pay of the navy as it existed on the 1st day of January, 1835, as the standard for all cases coming within that section.

ATTORNEY GENERAL'S OFFICE,

November 10, 1837.

SIR: I have examined the correspondence between the department and Commodore Jones, relative to his claim to arrears of pension under the act of the 3d of March, 1837, "for the more equitable administration of the navy pension fund;" and have the honor to state that, in my opinion, the second section of that act plainly adopts the pay of the navy as it existed on the 1st day of January, 1835, as the standard for all cases coming within that section; and that I do not see any legal warrant for a different construction. There is certainly much difficulty in perceiving any equitable ground for increasing the pension, as to past cases, beyond one-half of the pay to which the party was from time to time entitled; but Congress had the power to do it, and the words employed seem to me to be imperative.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Retention of Bonds of Deposit Banks.

PENSIONS TO WIDOWS OF STEWARDS.

A steward serving on board a ship-of-war is borne on the ship's books as one of the crew, and as such is amenable to martial law, and is therefore a seaman; and, under the proper circumstances, his widow is entitled to a pension.

ATTORNEY GENERAL'S OFFICE,
November 18, 1837.

SIR: In reply to your letter of the 3d instant, in relation to the claim of Mrs. Proctor, I have the honor to inform you, that if (as I understand is the fact) the steward serving on board a ship-of-war is borne on the ship's books as one of the crew, and is amenable to martial law, I think he must be regarded as a *seaman*, within the pension laws, so as to entitle his widow to a pension. In the particulars stated, such a case is entirely distinguishable from that of the *hospital* steward to which you refer.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

RETENTION OF BONDS OF DEPOSIT BANKS.

The bonds of the deposit banks are analogous to the bonds given by public officers on their appointment, and should be retained in the public archives, unless Congress shall otherwise determine.

ATTORNEY GENERAL'S OFFICE,
November 20, 1837.

SIR: In reply to the question proposed in your letter of the 9th instant, enclosing for my perusal the communication of T. W. Olcott, esquire, president of the Mechanics' and Farmers' Bank, I have the honor to inform you that, in my opinion, it is not your duty to direct the Comptroller of the Treasury to return to that bank the bond executed by it with sureties for the faithful performance of its duties as one of the banks selected under the act of the 23d of June, 1836. After a full consideration of the subject, I think the bonds required by that act must be regarded in the same light as the official securities given by officers of government on their appointment. Such

Contracts for Supply of Ordnance.

bonds, it appears from your statement, by the uniform course of the general and State governments, are retained among the public archives, although the office of the principal may have expired, and his accounts have been satisfactorily settled. The bonds given by the deposit banks are certainly much more analogous to securities of that class than to custom-house bonds; and, until Congress shall make provision to the contrary, I see no sufficient reason for departing from the practice which you have applied to them.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

CONTRACTS FOR SUPPLY OF ORDNANCE.

By the act of 1815, which repeals all other acts coming within its purview, the colonel, or senior officer of the Ordnance Department, under direction of the Secretary of the Department of War, may make contracts for the supply of ordnance without previously advertising for proposals.

ATTORNEY GENERAL'S OFFICE,

November 22, 1837.

SIR: In reply to the question proposed to me in your letter of the 23d of March last, I have the honor to inform you that, under the act of the 8th of February, 1815, "for the better regulation of the Ordnance Department," I am of opinion there is authority for making contracts for the supply of ordnance, without previously advertising for proposals, as required by the fifth section of the act of the 3d of March, 1809.

The 3d section of the act of 1815 makes it "the duty of the colonel, or senior officer of the Ordnance Department, to furnish estimates, and, under the direction of the Secretary for the Department of War, to make contracts and purchases for procuring the necessary supplies of arms, equipments, ordnance, and ordnance stores."

The 14th and last section of the same act declares "that the act passed May 14, 1812, entitled 'An act for the better regulation of the Ordnance Department,' and the sections of any other acts coming within the purview of any of the sections of this act, be, and the same are hereby, repealed."

Interest on Demands against the United States.

The provision of the 5th section of the former law of 1809 certainly comes within the purview of the 3d section just quoted, and I think, therefore, must be regarded as repealed. On this ground, as well as for the reasons stated in the argument enclosed to me, (which I think, in the main, well-founded,) I am of opinion that contracts for the supply of ordnance are not within the special provision of the act of 1809.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

INTEREST ON DEMANDS AGAINST THE UNITED STATES.

Interest on a demand against the United States is properly allowable where the claimant, in a suit against him, obtained a judicial decision in his favor, and the act of Congress providing for its payment proceeded upon the knowledge that interest had been allowed by the court.

Independently of the reports in this case, the Attorney General is inclined to the opinion that the law itself, which requires the accounting officers to recognise the judicial decision as settling the true construction of the contract and the relative rights of the parties under the same, requires the payment of interest.

ATTORNEY GENERAL'S OFFICE,

November 23, 1837.

SIR: In answer to the questions proposed to me upon the memorial of Joseph Thomas to the President, referred to me by your letter of the 22d instant, I have the honor to state that, in my opinion, the reports of the committees of the Senate and House of Representatives upon the bill for his relief, which subsequently passed into a law, and which was approved on the 2d of July, 1836, should be taken as a guide in deciding any doubts which may arise in the construction of that law. The bill originated in the Senate, where it was accompanied by a full report from the Committee on the Judiciary, by whom it was introduced. It passed the Senate without alteration; and when it came to the House of Representatives, was referred to the Committee on the Judiciary of that body, who also made a full report; after which it passed the House without amendment. Under these circumstances, these two reports may well be regarded as a key to the intention of the legislature; and

Interest on Demands against the United States.

where they concur on the propriety of any particular allowance, and the words of the law are not inconsistent with them, we may safely presume that such allowance was intended to be made.

These principles apply to the claim of *interest*; which, it appears, the accounting officers do not think a proper allowance, because the law does not *expressly* give interest. As a general rule, their view is the correct one; but, in the present case, the claim of interest was distinctly in issue before the court in which the suit of the United States against the claimant was tried; and one of the points settled by the judicial decision in that case, as appears from the certificate of the clerk, was, that the claimant was entitled to interest. Independently, therefore, of the light shed on the question by the reports, I should be strongly inclined to think, on the words of the law itself, which requires the accounting officers to recognise the judicial decision "as settling the true construction of the contract, and the relative rights of the parties under the same," that the claimant was entitled to interest. But any doubt I may have had on this point is removed from my own mind by the explicit declaration, in each of the reports, that *interest* had been allowed by the court; by the declaration of the Senate committee, that the judgment ought to be "considered as definitively settling the relative rights of the parties;" and the still more explicit declaration of the House committee, "that this judicial construction of the contract by a court of the United States, to which the government appealed, and acquiesced in by the government, was, in fact, final and conclusive between the parties, and, upon every acknowledged principle of justice, ought to be carried out in the adjustment of the entire account, as well as that part of them which it was in the power of the memorialist to bring under the consideration of a judicial tribunal." I am also confirmed in this conclusion by a conviction, after looking into the original contract and all the papers, that the claim to interest is agreeable to equity and justice. This conviction, in the absence of a special reference to the judicial decision, and of the references to the question of interest in the reports of the committees, might not, perhaps, have been sufficient to take the case out of the general rule

Interest on Treasury Notes.

stated by the accounting officers; but when it corroborates the conclusion to which those references lead us, there would seem to be little room for mistake in that conclusion.

The memorial of the claimant requests that the opinion of the Attorney General may be taken "as to what points the opinion and judgment of the court are to be considered as establishing;" but it does not specially refer to any point, except the claim to interest. I must, therefore, content myself with replying, in general, that the documents showing what questions were discussed on the trial, and on the motion for a new trial, and the reports of the two committees, must also be resorted to, in this respect, for the purpose of explaining this part of the law. Where it appears, from the first of these sources, that a particular question was raised, discussed, and decided by the court in favor of the claimant, and where the two reports concur in the like statement, it seems to me the legislature must be understood as intending that such decision should be taken by the accounting officers as settling the construction of the contract and the rights of the parties.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

INTEREST ON TREASURY NOTES.

Interest on treasury notes issued under the act of the 12th October, 1836, and placed in the hands of disbursing officers to meet public liabilities, does not begin to accrue until they are actually issued by such officers.

ATTORNEY GENERAL'S OFFICE,

December 2, 1837.

SIR: I have considered the question referred to me by your letter of the 28th ultimo, and, in reply thereto, have the honor to inform you that, in my opinion, treasury notes made under the act of the 12th of October last, and placed in the hands of disbursing officers to meet public liabilities, have no legal existence or validity whilst in the possession and under the control of such officers; that, for all legal purposes, they are to be considered as issued when they are delivered in payment by

Compensation to Cherokee Reservees.

such officers, and not till then; and, consequently, that no interest should be added to the sum expressed in the body of the note, when it is so delivered in payment, notwithstanding it may bear date as of a prior day. But, to prevent the United States from being afterwards required to pay interest from such prior date, the disbursing officer should note in writing, on the instrument, the day on which it was actually issued, so as to give notice of the fact to all persons who may subsequently receive the note. Or the same object may be effected by leaving the date blank until the note is delivered in payment, and authorizing the officer to insert the proper date.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY

COMPENSATION TO CHEROKEE RESERVEES.

The first and second classes of Indian reservees provided for in the thirteenth article of the treaty of December, 1835, with the Cherokees, are entitled to compensation in money in lieu of their interests, notwithstanding the supplementary articles concluded after the refusal of the President to allow pre-emption.

In respect to the third class there is doubt; yet the Attorney General, on the whole, concludes that the reservees of that class are also entitled, individually, to compensation in money.

The compensation to the first and second classes must be paid by the United States, not out of the supplementary fund; but that to the third class must be paid from the \$600,000 set apart in the supplementary articles.

This opinion further treats of the expenses of removal and the laying out of reservations in certain cases.

ATTORNEY GENERAL'S OFFICE,

December 6, 1837.

SIR: In compliance with the request contained in your letter of the 21st ultimo, I proceed to state my opinion on the several questions arising under the late treaty with the Cherokees, proposed by the Commissioner of Indian Affairs.

"1. Are all or any reservees, or claimants to reservations, under the twelfth, thirteenth, and supplementary articles of the treaty of December, 1835, with the Cherokees, entitled to compensation in money in lieu of their interests?"

Compensation to Cherokee Reservees.

The 12th article gave a pre-emption right to a quarter section of land to each head of a Cherokee family who might desire to reside within the States of North Carolina, Tennessee, and Alabama, and should be certified to be qualified to become a useful citizen.

The 13th article, in order to settle all claims for reservations granted under former treaties, made provision for all such claims as follows:

1st. Those reservees who had not sold or conveyed their reservations, and had complied with the terms on which they were granted, but whose reservations had been sold by the United States, were to be paid by the United States the present value thereof as unimproved lands.

2d. Those who had been obliged by the laws of the States to abandon their reservations, or to purchase them from the States, were to be paid by the United States the amount paid to the States, with interest; or, if obliged to abandon, the present value as unimproved lands.

3d. The reservations not sold by the United States, and the conditions of which had been complied with by the reservees, were confirmed to such reservees and their descendants, and were to be granted to them; and this was to extend to all reservees under the treaty of 1817, although, by the treaty of 1819, their reservations were included in the unceded lands.

It is thus seen that the twelfth article granted certain original pre-emption rights, which, if carried into effect, would have secured to the pre-emptors a residence in the States above enumerated; and that the third class of persons provided for in the thirteenth article were also expected to become residents of the States, and, accordingly, they are to receive grants of certain reservations given by former treaties. It is also seen that, in respect to the first two classes of persons provided for in the 13th article, it gave them a pecuniary compensation for reservations taken from them by the United States, but did not contemplate their becoming residents of the States.

We must now look into the supplementary articles. The preamble states that "the President of the United States had expressed his determination not to allow any pre-emptions or reservations—his desire being that the whole Cherokee people

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should remove together, and establish themselves in the country provided for them west of the Mississippi." It was therefore agreed by the first supplementary article that "all the pre-emption rights and reservations provided for in articles twelve and thirteen should be, and they are hereby, relinquished and declared void." The effect of this article plainly is to abrogate all those parts of the 12th and 13th articles which purported to secure to Cherokees places of residence in the States, either through the means of pre-emption rights, or of reservations. In other words, the whole provision as to pre-emption rights, and the provision for the third class of persons above mentioned, are annulled by the first supplementary article; the claim to a pre-emption right in favor of individual Cherokees is gone entirely; and the claims of the third class referred to, if any they have, are left to depend on the former treaties under which they may have arisen, or to be subsequently provided for.

But I do not understand the first supplementary article as abrogating those parts of the 13th article which gave a pecuniary compensation to reservees under former treaties; those parts not being within the words of the new articles, nor within the reason of the President's objection as stated in the preamble. I am therefore of opinion that the first and second classes of reservees above enumerated are entitled to compensation in money, as provided in the 13th article.

In regard to the third class of reservees above mentioned, I find it exceedingly difficult to extract from the ambiguous and conflicting provisions of this treaty any very satisfactory conclusion. The result to which I have come (and which, on the whole, I think the better opinion) is, that the reservees of the above-named third class are also individually entitled to a compensation in money, in lieu of their interests secured to them by the former treaties. In compliance with the President's desire, they are to remove with the rest of the nation. Consequently, their reservations are to be given up to the United States; and they seem, in justice, to be as well entitled to indemnification as either of the other classes. By the third supplementary article, the sum of \$600,000 is also appropriated, among other things, "in lieu of the reservations and pre-emp-

 Compensation to Cherokee Reservees.

tions" abrogated by the first article. This shows that, in adopting that sum instead of the \$300,000 conditionally provided in the original articles, it was intended, among other things, to provide an equivalent for the abrogated reservations and pre-emptions; and, for reasons which I shall hereafter explain, I think the grant of \$600,000 will inure to the individual benefit of the reservees of this class.

It is proper to add, before I leave this question, that the reservees who may be entitled to pecuniary compensation under the 13th article, and the supplementary articles, as above expounded, cannot claim pay for improvements under the 9th article, which, it appears to me, is exclusively applicable to lands ceded by the treaty of 1836.

In the event of an answer in the affirmative to the above question, the following questions are also proposed:

"2. Must such a compensation be provided by the United States, or must it be paid by the Cherokees?"

"3. If by the Cherokees, must all be satisfied out of the \$600,000 set apart in the supplementary articles?"

"4. Should the \$600,000 be deemed applicable, and should prove insufficient to effect all the objects for which it is provided, how is it to be divided, and how are the objects not completed to be accomplished?"

"5. Should not a sum sufficient to remove the Indians be reserved, and the remainder be applied to the other objects?"

These questions may conveniently be answered together.

The thirteenth article closes with the following provision: "It is expressly understood by the parties to this treaty, that the *amount* to be allowed for *reservations* under this article shall *not be deducted* out of the consideration money allowed to the Cherokees for their claims for *spoliations* and the *cession of their lands*; but the same is to be paid for, independently, by the United States, as it is only a fulfilment of former treaty stipulations." The consideration money here referred to, was—first, the \$5,000,000 mentioned in the resolution of the Senate referred to in the treaty; and, secondly, the sum of \$300,000 conditionally provided in article first. The second and third supplementary articles grant the sum of \$600,000 "for the express purpose of removal, and all claims of every

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nature and description against the government of the United States not herein otherwise expressly provided for, and to be in lieu of the said *reservations* and *pre-emptions*, and of the sum of \$300,000 for *spoliations* described in the first article of the above-mentioned treaty." This sum of \$600,000 is to be "applied and distributed agreeably to the provisions of the said treaty; and any surplus which may remain after *removal* and *payment of the claims so ascertained*, shall be turned over and belong to the education fund."

These provisions are to be taken in connexion with the un-abrogated parts of the original articles; and, thus regarding them, I am of opinion—

1. That the compensation to be made to reservees of the *first* and *second* classes above mentioned must be paid by the United States, and not out of the moneys allowed by the treaty to the Cherokees. This was expressly engaged by the thirteenth article, and is not altered by the supplement.

2. That the compensation to be made to reservees of the *third* class must be paid out of the \$600,000 set apart in the supplementary articles. This sum, as I have already had occasion to observe, is in part an equivalent for the pre-emption rights and the confirmatory grants of reservations proposed to be given by the twelfth and thirteenth articles. So far, however, as it relates to *pre-emptions*, I think it must be considered as inuring only to the benefit of the nation; because no particular individual, at the making of the treaty, had any existing pre-emption right; because such a right, until after it has been actually exercised, cannot be valid; and because, also, the individuals who were to have this right were to be ascertained by their willingness and capacity to become *citizens of the States*, to be determined by certificates to be made for that purpose, to all which the supplementary articles are certainly repugnant. But, so far as it relates to the *reservations* in question, I think the grant of \$600,000 inures to the benefit of the individual reservee; because he had, under former treaties, an existing right to a reservation, which is capable of being identified and valued.

3. The expense of removal is, undoubtedly, the first charge on the fund of \$600,000, the removal of the nation being an

Compensation to Cherokee Reservees.

object of necessity and paramount importance; and the balance is to be applied to the satisfaction of the various claims which shall have been established. I can see no good reason for giving to any one class of these claimants a preference over others; and in case of the balance of the \$600,000 remaining after the expense of removal shall have been defrayed, being insufficient to meet the whole amount of the claims, I think it should be ratably distributed. There is no express provision for such a case, nor does it seem to have been contemplated; but it appears to me that the deficiency, if any, should be charged on the general fund of five millions of dollars.

In your letter of the 13th of October, you referred to me a communication of Messrs. Lumpkin and Kennedy, stating several questions; all of which, I presume, will be found disposed of in the preceding opinion, except the following:

1. "Is Milton's claim for compensation under the treaty of 1806, now before the commissioners, a valid one?"

2. "How shall reservations be laid out in reference to the dwelling and other improvements of the reservee?"

The tract referred to in the first of these questions is one of two tracts *excepted*, by the first article of the treaty of January 7, 1806, from the territory ceded by that treaty. The article, after describing the premises, declares that the "first reserved tract is to be considered the common property of the Cherokees who now live on the same, including John D. Chisholm, Autowwe, and Chechout; and the other reserved tract, on which *Moses Milton* now lives, is to be considered the *property* of said Milton and Charles Hicks, in equal shares." No estate in either of these two tracts was ceded to the United States by the treaty of 1806; and the Indian title remained unimpaired by that instrument, except so far as it may have had the effect to give to the occupants enumerated, and to Milton among others, a separate property therein. Without attempting to determine as between the Cherokee nation and Milton the nature and extent of the rights acquired by him, I think it very clear, from the manner of the exception, and from the non-conformity of the case to the descriptive language of the 13th article of the late treaty, that the heirs of Milton have no valid claim under that article.

Pre-emptions to Officers.

I see no good reason for regarding the dwelling-house as necessarily the centre in laying out the reservation. I think all the improvements, the cultivated fields, and the dwelling-houses, ought to be taken into account; and that the whole, so far as practicable, should be made the central part of the section.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PRE-EMPTIONS TO OFFICERS.

An officer of the army of the United States, in actual service, may have a valid pre-emption claim as settler or occupant of public lands, although it may seem to be incompatible with the condition of an officer in actual service.

ATTORNEY GENERAL'S OFFICE,

January 19, 1838.

SIR: It appears from the papers enclosed in your letter of this date, that John Green, an officer of the army of the United States, who in 1833-'34 was in actual service at Chicago, claims a quarter section of land in the vicinity of that post, under the pre-emption law of the 19th of June, 1834; and that the register and receiver are satisfied that he had complied with the requisites of the law. The question, however, arises, Whether an officer of the army can, under such circumstances, be considered a *settler* or *occupant* of the public lands, within the meaning of the law? and on this question you ask my opinion.

As the law embraces "*every* settler or occupant of the public lands," and contains nothing to exclude persons of any profession, I do not see any sufficient legal ground for rejecting the claim of an officer of the army, who has actually settled, cultivated, and possessed public lands, in the manner prescribed by Congress. Such a settlement, cultivation, and possession, can seldom, I should think, be compatible with the condition and duties of an officer of the army in actual service; but, under peculiar circumstances, they may actually exist; and, in such case, I am of opinion the claim must be allowed.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

Compensation, &c., to Cherokee Reservees.

COMPENSATION, &c., TO CHEROKEE RESERVEES.

This opinion explains that delivered on the 6th day of December last in respect to compensation, and reasserts that the persons entitled to pecuniary compensation for reservations under the 13th article of the treaty, are not entitled under the 9th article for improvements on the same reservations.

The balance of the fund of \$600,000, after defraying from it the expenses of removal, which is the first charge upon it, was that designated by the treaty for the satisfaction of the various claims provided for therein; if insufficient, to be ratably distributed, and the balance to be charged to the general fund of \$5,000,000.

There is no occasion for dividing the \$600,000, as the several agreements concerning compensation and spoliation are to be considered as one treaty.

ATTORNEY GENERAL'S OFFICE,

February 3, 1838.

SIR: I have had the honor to receive your letter of the 27th ultimo, enclosing a communication from the Commissioner of Indian Affairs, requesting information on certain points embraced in my opinion of the 6th of December last, construing certain provisions of the late treaty with the Cherokees.

The first passage referred to by the Commissioner was intended to prevent it from being supposed that the persons entitled to pecuniary compensation for reservations under the 13th article, and the supplementary articles, as expounded in the opinion, were also entitled under the 9th article to pay for improvements on the same reservations; my opinion being, that the 9th article related exclusively to improvements on the lands ceded to the United States by the 1st article, and, consequently, that the reservees provided for in the 13th article were restricted to the benefits secured to them by that article and by the supplementary articles.

The principles intended to be stated in the subsequent part of the opinion referred to by the Commissioner were—

1st. That the expense of removal was the first charge on the fund of \$600,000.

2d. That the balance of that fund, after paying the expense of removal, was the fund expressly designated by the treaty for the satisfaction of the various claims provided for therein.

3d. That, should such balance be insufficient to pay all the claimants, it ought to be ratably distributed among them.

Compensation, &c., to Cherokee Reserves.

4th. That there was no express provision for the case of *deficiency*, nor did it seem to have been contemplated; but that it appeared to me, should a deficiency exist, it ought to be charged on the general fund of \$5,000,000.

The effect of this arrangement will be, that, by first giving the claimants their proportions of the balance of \$600,000, and then paying the deficiency out of the general fund, the whole amount of the claims will be paid; and, therefore, that the preference given to the expense of removal will be merely nominal. This apparent incongruity, however, results from the creation of the special fund of \$600,000, and from the necessity of dealing with it by itself.

The Commissioner, after stating that the sum of \$600,000 is to be "in lieu of reservations and pre-emptions, and the sum of \$300,000 for spoliations described in the first article of the treaty," proposes the following questions:

"Ought not \$300,000 to be applied to the payment of claims for spoliations, if they reach that amount? If so, in what way can the excess of the expense of compensating for reservations and pre-emptions, and for other claims not expressly provided for, over the remaining \$300,000 (should any, as is probable, happen) be paid? To what fund provided in the treaty might it properly be charged?"

The idea that \$300,000 is, at all events, to be applied to the payment of claims for *spoliations*, though perhaps naturally suggested by the provision in the 1st article, does not appear to me to be well founded. We are undoubtedly to take the several parts of this instrument, when submitted to the Senate, as one treaty; but the provisions of the supplementary articles, being those which express the last agreement of the parties, are to be primarily regarded in the construction of the treaty. Thus regarding them, I see no sufficient authority for splitting up the fund of \$600,000 into any minor subdivisions; and I think that if, after paying the expense of removal, there should not be enough remaining to pay all the claims, spoliations and others, the several claimants must ratably suffer a loss of their claims, unless they can be paid out of the general fund of \$5,000,000. In my former communication, I expressed the opinion that they could and ought to be so paid; and

Secretary of Navy to satisfy a Judgment against Com. Elliott.

though there are certainly great difficulties in the case, such is still my impression.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

SECRETARY OF THE NAVY TO SATISFY A JUDGMENT AGAINST
COMMODORE ELLIOTT.

The Secretary of the Navy may pay the amount of the judgment recovered against Commodore Elliott, for acts done in the performance of his official duty, if there are funds within his control properly applicable to such an object.

ATTORNEY GENERAL'S OFFICE,
February 28, 1838.

SIR: In reply to your communication of the 22d of December last, I have the honor to inform you that I am not aware that any reason exists which would render improper the payment by your department of the judgment for nominal damages and costs recovered against Commodore Elliott by the heirs of John Harris, provided there be any appropriation of moneys under the control of the department applicable to such an object.

By the second section of the act of the 30th of June, 1834, "authorizing the purchase of live-oak frames for a frigate and sloop-of-war, and for other naval purposes," the district attorney, the Solicitor of the Treasury, and the Attorney General were directed to defend this suit in all its stages. The recovery was for acts done by Commodore Elliott in the performance of his official duty, and for costs occasioned by the defence made by the United States. It is therefore one of those cases in which the officer ought to be fully indemnified; and the section to which I have referred may well be regarded as authorizing the department to pay the amount required for such indemnification, if, as already suggested, there be any funds within its control properly applicable to such a subject. If there be not, I should think it might be paid by the Treasury Department out of the annual appropriation for the expense of suits in which the United States are concerned.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Correction of an Error in Date of an Appointment.

EXISTENCE OF WAR WITH THE SEMINOLES.

A public war, within the constitution and the rules and articles of war, has existed with the Seminoles since the day Congress recognised their hostilities and appropriated money to suppress them.

ATTORNEY GENERAL'S OFFICE,

March 9, 1838.

SIR: In answer to the question proposed to me, on a recent report of Major General Jesup to your department, I have the honor to state that, in my opinion, the hostilities existing with the Seminole Indians have constituted, since the 14th of January, 1836, a public war with that tribe of Indians, within the meaning of the rules and articles of war and of the constitution of the United States. Congress, by a law approved on that day, recognised the commencement of these hostilities, and appropriated money to suppress them. Several appropriations for the same object have been made by law, so that, although no formal declaration of war has been made, (probably because deemed unnecessary,) the war, on our part, has been waged by authority of the legislative department, to whom the power of making war has been given by the constitution. There are, indeed, cases in which a war between the United States and a public enemy may exist without the sanction of Congress—as where an unexpected war is commenced against the United States, and waged before Congress act upon the subject. But it is not necessary to place the present case on that ground; because, as already stated, Congress have repeatedly made provision for the hostilities in question.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

CORRECTION OF AN ERROR IN DATE OF AN APPOINTMENT.

The President and Senate, by nomination and confirmation, may correct the date of military appointments even after as great a lapse of time as that which has occurred in the case of Captain Twiggs.

ATTORNEY GENERAL'S OFFICE,

March 9, 1838.

SIR: In reply to the question proposed in your letter of the 27th ultimo, I have the honor to state, that I suppose it com-

When Assistant entitled to Pay of Surgeon.

petent for the President and Senate, should the former make the proper nomination, and the latter confirm it, to correct an error in the date of an appointment, even after so great a lapse of time as that which has occurred in the case of Captain Twiggs, as stated in your letter. But, even if such a correction should be made in this case, Captain Twiggs, according to the opinions of the Attorney General of the 5th of April, 1824, and the 20th of February, 1828, could not receive a second brevet, unless he actually performed the appropriate duties of *captain* for ten consecutive years prior to the 30th of June, 1834. If such duties were performed, then on the 30th of June, 1834, he had acquired, within the meaning of the repealing law, a right to be brevetted; and, on correcting the error in the date of his commission as captain, it might now be rendered available.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

WHEN ASSISTANT ENTITLED TO PAY OF SURGEON.

The assistant surgeon is entitled to the pay of a surgeon whenever he is called to discharge the peculiar duties of a surgeon; but those duties must be such as can only be performed by him when present.

ATTORNEY GENERAL'S OFFICE,

March 10, 1838.

SIR: In answer to the question proposed to me in your letter of the 7th instant, I have the honor to inform you that, in my opinion, if there be any duties *peculiar* to the office of surgeon in the navy, and different from those which ordinarily belong to the office of assistant surgeon, an assistant surgeon temporarily performing them will be entitled, under the acts of May 24, 1828, and March 3, 1835, for the time being, to the compensation allowed to surgeons. But, to entitle any inferior officer, under this latter law, to the pay of a higher grade, the duties to be performed by him must *belong*—that is, as I construe it, be *peculiar*—to the higher grade, and such as can only, when the officer of the higher grade is present, be performed

Duties of Attorney General—Pre-emptions.

by him. Whether this is the fact or not in the case of a surgeon in the navy, I do not know; and must therefore content myself with stating what I conceive to be the general principle applicable to such cases.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

DUTIES OF ATTORNEY GENERAL—PRE-EMPTIONS.

The Attorney General has no authority to settle questions of fact, nor to give any opinion or advice on questions of law, except for the assistance of the officer calling for his opinion on points stated. He is obliged to take the facts of a case to be as they are stated to him, and to predicate his opinion thereon.

As to the personal residence and inhabitancy on public lands necessary to confer the right of pre-emption, former opinions on the subject are referred to, indicating that where there is but a partial cultivation under the immediate personal direction of the claimant, as the head of a family, by himself, hired men, servants, or slaves, and a settlement and occupation actually intended to be made, and is subsequently made by the claimant, he is entitled to the benefit of the laws.

In the case described neither actual residence nor inhabitancy on the lands is requisite to the right of pre-emption.

ATTORNEY GENERAL'S OFFICE,

March 10, 1838.

SIR: In your letter of the 10th of November last, you inquire whether, in my opinion of the 29th of March, 1837, in the case of Adams and Lapsley, "it is meant to be laid down as a general rule, that actual residence on the lands is not an essential requisite to the right of pre-emption in any cases where cultivation by hired men or slaves has been extended from private to adjoining public lands; and where the only occupancy of such public lands has been a partial cultivation of the same?"

That the bearing of the question might be understood, you also enclosed me the papers in the case of Messrs. Gwinn, Vick, and others, out of which it arose, and referred me to a paper containing certain questions proposed by the counsel for Mr. Gwinn, and desired me to consider such of them as I might think material in the case. Subsequently to the receipt of these documents, the counsel and agents for the others of

Duties of Attorney General—Pre-emptions.

the parties addressed me several communications, some of them objecting to the questions proposed by the counsel of Mr. Gwinn, and others proposing several other questions. I have also recently received a letter from yourself, in which you enclose a communication addressed to you by Mr. Vick, embracing a statement of the case as he understands it; on which you request me, if, on examining the case, I should find the facts are such as stated by him, to advise the department on the points of law raised in his statement.

As the Attorney General has no authority to settle questions of fact, nor to give any opinion or advice on questions of law, except for the assistance of the officer calling for his opinion, and on the points stated by such officer, I shall confine myself, in the present instance, to the question distinctly proposed in your communication of the 10th of November, and above quoted; leaving it to the department, in case my answer shall not cover all the points on which my opinion is needed, to propound such further questions as it may deem expedient.

The opinions of the 21st of June, 1836, and 29th of March last, though intended to lay down general principles by which cases under the pre-emption acts of 1830 and 1834 should be governed, must yet be regarded in connexion with the facts of the case as assumed in the questions proposed to me, and must be understood with the limitations which the nature of the case and the terms of the questions properly impose. The opinions of courts and of judicial officers are always to be taken with these qualifications; and it is peculiarly necessary that this rule of construction should be applied to the opinions of the Attorney General, inasmuch as he always takes the facts of the case to be as stated to him, and confines his opinion to the distinct points proposed, and is moreover often obliged to examine the case without the benefit of argument on either side.

In the case of Adams and Lapsley, it was stated in the question first proposed to me, that the claimant had "*caused* the cultivation of an acre and a half of public land in 1833, on a particular quarter section, and was in possession thereof on the 19th of June, 1834; but was engaged during the former years in cultivating other lands, not of the United States, and was boarding in the neighborhood." On this state of

facts, my opinion was asked whether the claimant "was entitled to pre-emption of the quarter section he *caused* to be cultivated?" After showing that the words "*occupant* or *settler*," in the pre-emption laws, were to be confined to one who "*personally* occupies and resides on, or *personally* occupies and uses the public lands," and that they "excluded all idea of a settlement by proxy," the opinion of the 21st of June, 1836, answered the above question in the negative; because, according to the facts stated in it, the claimant seemed never to have been, in the sense explained in the opinion, a "*settler*" or "*occupant*" of the public lands. For aught that appeared or was intimated to the contrary, his cultivation had been *caused* by proxy—by some tenant or other individual whom he had placed on the land, without exercising over him any personal supervision, or having any direct personal connexion with the land claimed by him.

This opinion, if limited to the particular case before me, and in reference to which it was expressed, would not, I presume, have required explanation; but on the point decided in it, it differed from the views expressed by one of my predecessors, (Mr. Berrien,) and its application to other cases became a subject of doubt in the General Land Office, especially as it appears to have been insisted, by claimants whose interests would be promoted by such a construction, that the opinion required in all cases a personal residence or inhabitancy on the land. To settle these doubts, the matter was again referred to me, and explained in the opinion of the 29th of March last. To prevent misconstruction, by extending the decision in the case which had been made by me to cases not similar to it in point of fact, nor within its reason, it was remarked, that whilst it was deemed essential that the party should have a direct personal connexion with the land claimed by him; and whilst residence or inhabitancy on the land, in addition to cultivation, was the highest degree of such personal connexion of which the subject was susceptible, "it was not supposed that actual residence or inhabitancy on the land was indispensable." To illustrate this remark, several cases were put by me as instances in which I supposed that the party would be fairly within the spirit and meaning of the law, although

Duties of Attorney General—Pre-emption.

he had not actually resided on the land claimed by him. But it must be observed that no one of these cases was before me for decision, and that they were all stated argumentatively. And it must also be observed, that in each of them it is assumed that a *settlement* on, and *occupation* of, public lands was *intended* to be made by the claimant, and was also *actually* made by him, so far as the circumstances of his particular case reasonably allowed and required, in order to bring him within the spirit and object of the pre-emption law. In cases including this ingredient, the remarks referred to contain, in my judgment, the true principles of the law; and to all such cases I think they should be applied. The case of the Messrs. Winchell, considered in my opinion of the 10th of July last, was one of that description; the parties having *personally* cultivated public land, and having ploughed, fenced, and planted in corn twelve acres, and erected a house in which they both lived, (one being a single man and boarding with the other;) which house was found, by the survey subsequently made, to be one rod over the line of the quarter sections cultivated and possessed by them, and on an adjoining section of public land. Its location on that section was evidently occasioned by a mistake as to the line; and no doubt whatever could exist as to the intent of the parties to make a settlement on the particular quarter sections which they claimed.

The case suggested in the question now proposed to me is one "where cultivation by hired men or slaves has been extended from private to adjoining public lands, and where the only occupancy of such public lands has been a partial cultivation of the same." In such a case, if the hired men or slaves belong to the family of the claimant; and if their labor was applied to the improvement and cultivation of the public lands, under the immediate personal direction of the claimant as the head of the family; and if a settlement on, and occupation of, such public lands was intended to be made by the claimant, and was also actually made by him, so far as the circumstances of his case reasonably required and allowed;—then, according to the principles of my former opinions and to my present views, the claim should be allowed, although there was no actual residence on the lands. In other words, in the case

Pre-emption.

just described I should not consider actual residence or inhabitation on the lands an essential requisite to the right of pre-emption.

In the hope that the principles intended to be stated will, by the above explanation, be rendered sufficiently intelligible,

I have the honor to remain, very respectfully, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PRE-EMPTIONS.

Where the improvement is on a fractional section containing over 160 acres, the claimant may enter, in conformity with the legal subdivisions recognised by the acts of 1830 and 1834, a quantity of land not exceeding 160 acres.

A 40-acre lot created by the operation of the act of April 5, 1832, is not such a legal subdivision, and cannot be taken in addition to the fractional quarter containing the pre-emptor's improvement.

The third article of the circular of July 22, 1834, and the third and eighth articles of the circular of October 21, 1834, are not inconsistent with the law.

ATTORNEY GENERAL'S OFFICE,

March 16, 1838.

SIR: I proceed to state my opinion on the pre-emption claim of Peter Juneau, referred to me by your letter of the 24th of November last.

It appears from the documents enclosed to me, that the claimant, under the act of June 19, 1834, proved cultivation and possession of lots *three* and *four*, being the entire *south-west* fractional quarter section *twenty eight*, (rendered fractional by Lake Michigan;) and as this quarter amounted to only one hundred and twenty acres, the register and receiver permitted him to enter lot *two* of the *northwest* quarter of the same section, (*twenty-eight*;) containing 36.40 acres; thus making, in the aggregate, less than one hundred and sixty acres. The entry of lot *two* is regarded by the officers of the General Land Office as unauthorized and irregular; they think Juneau was only entitled to the quarter which includes his improvements; and they rely on the provisions of the 3d article of the instructions of the 23d of October, 1834, and the course of the office in similar cases, under those instructions and the laws of 1830 and

Pre-emption.

1834. A question is made, in behalf of the claimant, as to the true meaning of the article referred to, especially when taken in connexion with the 8th article of the circular of July 22, 1834; and you therefore ask my opinion on the following points:

“1. Were the land officers right, under the laws or instructions, in allowing the entry of lot *two*?

“2. If, according to the law, the land officers are authorized to allow the claimant ‘a quarter section, *or* one hundred and sixty acres, in legal subdivisions,’ and the latter, viz: ‘one hundred and sixty acres, in legal subdivisions,’ has been allowed in this case, is not the claimant entitled to a patent?

“3. If the instructions (8th article of July 22, 1834, and 3d article of October 23, 1834) authorize the entry, does the act of July 2, 1836, entitle the party to a patent?”

In replying to these questions, I shall first consider the case in reference to the provisions of the pre-emption laws; and then notice the effect of the instructions and the confirmatory act of July, 1836.

The pre-emption act of 1834 revives the act of the 29th of May, 1830, and gives to the settlers and occupants described in it all the benefits and privileges provided by that act; but contains nothing to determine the present case. On recurring to the act of 1830, we find that the claimant, on establishing his right, is authorized to enter, “by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter section, to include his improvement.” Under this provision, when the fractional section contains more than one hundred and sixty acres, I think the pre-emptor may be allowed to enter a quantity of acres not exceeding one hundred and sixty, in any tracts which form *legal subdivisions* of the section containing his improvement; and that the latter clause of the eighth article of the circular of July 22, 1834, was therefore authorized by, and conformable to, the act of Congress. Nor does the third article of the circular of October 23, 1834, appear to me to be inconsistent in this respect with the former instructions. If, therefore, lot *two* was a *legal subdivision* of fractional section *twenty-eight* for the purpose of this case: then, as that section contained more than one hundred and sixty acres; and

Pre-emptions.

as this lot, when added to the contents of the southwest quarter, still left the whole quantity less than one hundred and sixty acres, I am of opinion that the land officers were right in allowing it to be taken by the pre emptor. I am not able to say, on the papers before me, whether lot *two* was or was not such a legal subdivision of section *twenty-eight* as could be taken by the present claimant. It would seem, from some of them, that this lot was laid out, exclusively, under the act of the 5th of April, 1832. If this be the fact, then I am of opinion that the lot cannot be allowed to the claimant, in addition to the fractional quarter containing his improvements. The act of 1834 revives, with the original act of May 29, 1830, all intermediate amendments of a general nature incorporated in it; but the act of April 5, 1832, though it authorized the division of section *twenty-eight* into quarter sections, as nearly as might be practicable, must, I think, be regarded as doing so for the exclusive benefit of the purchasers and pre-emptioners specially provided for therein. At all events, if a pre-emptioner, under the revived act of 1830, can in any case be allowed to take quarter-quarter sections laid out under the act of 1832, on the ground of their being legal subdivisions, within the meaning of the revived pre-emption act of 1830, it can only be, in my opinion, where the aggregate quantity allowed to such pre-emptioner does not exceed eighty acres; that being the greatest amount which the persons specially provided for in the act of 1832 are allowed to enter or take under it. This would prevent the claimant from taking lot *three*, if surveyed under the act of 1832; for either of the other lots—and one of them must necessarily be taken, because it contains his improvements—with the addition of lot *three*, would exceed the prescribed limit of eighty acres.

The instructions of July 22 and October 23, 1834, do not, I think, contain anything repugnant to the construction above given of the acts of Congress; and if they do, the rights of claimants will not be enlarged by them, unless they can be brought within the second section of the act of July 2, 1836. As the department is best able to construe its own instructions, and as I am not informed by the papers before me that the register and receiver did, in fact, allow the entry of lot *two* in

Marshals' Fees and the Accounting Officers.

the present case, pursuant to instructions from the department, I can only refer, on this part of the case, to my opinions of the 6th of July and the 10th of August, 1836.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

MARSHALS' FEES AND THE ACCOUNTING OFFICERS.

The accounts of marshals certified by the court, or one of the judges thereof, as provided in the fourth section of the act of May 8, 1792, are conclusive upon the accounting officers of the treasury, except in cases where charges shall be allowed by the court or judge for a service or purpose not mentioned in the acts of Congress, and where a greater sum shall be allowed than that fixed by law.

As to whether a charge of two dollars for serving a writ of subpœna is proper, it is not perceived that there is any legal warrant for excepting it from the enacting words of the statute giving that compensation for the service of any process, &c.

ATTORNEY GENERAL'S OFFICE,

March 20, 1838.

SIR: It appears from your letter of the 12th of September last, that a difficulty has arisen in the settlement of the accounts of the marshal of the southern district of New York with the officers of the treasury, in respect to an item of two dollars charged by him for serving a writ of subpœna, which charge has been taxed and certified by the district judge of the southern district of New York, but disallowed by the Comptroller on the ground (as I understand from the papers accompanying your letter) that a *writ of subpœna* is not a writ necessary and allowable for summoning witnesses in the courts of the United States; and that the only charge which can be lawfully made by the marshal, is the charge of fifty cents for *summoning* each witness, and the charge for mileage. You therefore ask my opinion on the two following questions:

"1. Whether, by law, the marshal is not allowed *two dollars* for the service of each writ, warrant, process, or attachment on each person named therein, including the writ of subpœna?"

"2. Whether the accounts of the marshal, after having been examined and certified by the court, or one of the judges there-

Marshals' Fees and the Accounting Officers.

of, as provided in the fourth section of the act of May 8, 1792, are not conclusive on the accounting officers of the treasury?"

In answer to the first of these questions, I have the honor to inform you, that, although there is certainly good reason to doubt whether Congress intended to include the writ of subpœna for witnesses in the clause of the act of February 28, 1799, which gives the marshal two dollars for the service of "any writ, warrant, attachment, or process issuing out of any court of the United States," on each person named therein; yet, as the writ of subpœna may, in some of the States, be issued, and actually is issued, for witnesses, I do not perceive any legal warrant for excepting such a writ from these enacting words; and, consequently, I am of opinion that the question must be answered in the affirmative. It is true that this construction of the law may give to some marshals a larger compensation for summoning witnesses than will be received by others; but similar inequalities exist in the compensation of district attorneys and clerks, and they are only to be remedied by legislation. It is also true that the district attorneys might, perhaps, dispense with the *writ* of subpœna, and that a simple summons might answer all necessary purposes in this respect; but this is a question with which the marshal has no concern, for he is not at liberty to disregard any lawful process which may come to his hands.

The second question must also, I think, be answered in the affirmative, with this qualification: that where a charge is allowed by the court or judge for a service or purpose not mentioned in the acts of Congress, or where a greater sum than that fixed by law is allowed, the certificate of the court or judge may be regarded by the accounting officers as a nullity, and the charge disallowed or reduced, as the case may require. For example: suppose the marshal's bill, as examined and certified, contains a charge for summoning the counsel, or a charge of ten dollars for serving a writ: in the former case, the accounting officers should reject the item; and, in the latter, they should reduce it to *two* dollars; because in the one case the charge would be palpably illegal, and in the other as palpably excessive. But where the charge is for a service or purpose enumerated in the law, (as for the service of a writ, &c.,)

Marshals and the Accounting Officers.

and does not exceed the prescribed amount, I think the certificate of the court or judge is conclusive, and that the accounting officers have no right to interfere.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

MARSHALS AND THE ACCOUNTING OFFICERS.

The account of the marshal of the District of Columbia, for extra allowances to government witnesses on the trial for the burning of the treasury buildings, made by the circuit court, and certified, cannot be legally paid, notwithstanding the certificate, for the reason that no act of Congress authorizes payment of charges for such a purpose.

The distinction between this and the preceding case is, that here the service is not, whilst there it was, authorized by law. The two opinions read together clearly define the views of the Attorney General upon the subject of the efficacy and legal bearing of the certificate of the court upon the accounts of marshals.

ATTORNEY GENERAL'S OFFICE,

March 20, 1838.

SIR: I have duly considered the question arising on the rejected items in the account of the marshal of the United States for the District of Columbia, referred to in the correspondence between that officer, yourself, and the First Comptroller of the Treasury, and in your report to the President of the 19th of October last; and, pursuant to his directions, I proceed to state the result of my reflections thereon.

The rejected items amount to five hundred and ninety-four dollars and seventy-five cents, and are for *extra* allowances made by the circuit court of the county of Washington, on the application of the district attorney of the United States, to government witnesses, on the trial of the Whites for burning the treasury building, in order to meet the actual expenses of those witnesses in coming to, attending at, and returning from, the trial. These *extra* allowances, as appears from the documents before me, were deemed just and necessary by the President of the United States, and by your department, as well as by the district attorney and the court; and having been examined and certified by the court, according to the 4th section of the act of

Congress of the 8th of May, 1792, were paid to the witnesses, in addition to their *per diem* and travel fees, by the marshal. They have been rejected by the Comptroller, on the ground that no compensation can be made out of the treasury for the expenses of witnesses in government cases, under the laws now in force, except the special fees for attendance and travelling allowed by the 6th section of the act of the 28th of February, 1799.

After mature consideration of the several questions contained in the correspondence, and in your report, I am of opinion that the decision of the Comptroller, and the general view of the subject taken by him, are correct.

The constitutional duty of the President to take care that the laws are faithfully executed neither requires nor authorizes him, in cases of criminal offences against the laws of the United States, to incur any expenditure of the public moneys, except such as is authorized by act of Congress. When the provision made by Congress is of a general nature, there will be room for more or less latitude of discretion, according to the nature of the provision and the exigency of the case; but where the provision is a special one, like that made for enforcing the attendance of witnesses on the part of the United States, it appears to me that no greater or other compensation can be made than that prescribed by law.

It has been suggested that the special allowances in the present case might properly be made under the very comprehensive terms in which the appropriation for judicial expenses is usually made. But, in my judgment, that clause, so far as it relates to jurors and witnesses, and to the officers of courts, whose fees and compensation are prescribed by standing laws, must be understood as referring to those laws, and as authorizing such allowances, and such only, as are given thereby. The general words in the clause, though they certainly embrace many expenses of a contingent and special nature not expressly provided for by existing statutes, cannot, in my judgment, be extended to cases of ordinary occurrence, contemplated as such by Congress, and provided for in the manner they deemed adequate by general laws.

In my opinion of this date, in the case of the marshal of the

 Payment of Interest and Costs of a Protested Draft.

southern district of the State of New York, I had occasion to define the powers of the Comptroller in reviewing the action of the court or judge examining and certifying the marshal's accounts. According to the distinction taken in that opinion, the disputed items in the present case, being for a purpose not authorized by law, and in addition to all which the law did authorize, were properly rejected by the Comptroller.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PAYMENT OF INTEREST AND COSTS OF A PROTESTED DRAFT.

Where the Treasurer of the United States issued a draft upon a deposit bank to a navy agent, who sold it in order to raise money for necessary expenditures, and the draft was afterwards presented, and dishonored—HELD, that it was proper for the Treasury Department to pay the interest and costs incident to the dishonor, and the amount from the original appropriation under which it was drawn.

And as the holders are public creditors, the amount may also be paid in treasury notes under the 4th section of the act of 12th October, 1837.

ATTORNEY GENERAL'S OFFICE,

March 23, 1838.

SIR: In your letter of the 16th of January last, you state the following case:

"The Treasurer of the United States, on the 20th October last, drew upon the branch of the Bank of the State of Alabama, at Mobile, (an institution holding then, as well as now, a large balance of public money to the credit of that officer,) his draft in favor of Thomas Easton, navy agent at Pensacola, for \$45,364.

"This draft appears to have been presented at the branch bank upon which it was drawn, on the 6th of November, and payment refused. It has since come into the possession of the Bank of the United States at Philadelphia, which is now the holder.

"The holder of the draft claims of this department the payment of interest and costs incident to the dishonor of the draft."

Construction of Act for better Government of the Navy.

On this state of facts you ask my opinion on the question—whether, under existing laws, the allowance claimed can be made by the accounting officers? and, if so, out of what appropriation the amount is to be paid?

I assume, as you have since verbally informed me you believed to be the fact, that the navy agent sold the draft in order to raise money to meet necessary expenditures; that the proceeds were applied by him to that purpose; and that the present holder received it for value, and in good faith. Under these circumstances, I am of opinion that the claim to interest and costs is well founded, and may properly be allowed by the accounting officers. As the draft did not prove available, the original appropriation under which it was drawn yet remains applicable to it; and as the holders are public creditors, the amount may also, I think, be paid in treasury notes, under the 4th section of the act of the 12th of October last.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

CONSTRUCTION OF ACT FOR BETTER GOVERNMENT OF THE NAVY.

The 13th article of the act of Congress extends and refers only to officers commanding.

ATTORNEY GENERAL'S OFFICE,

March 30, 1838.

SIR: In answer to the question proposed in your letter of the 29th instant, I have the honor to inform you that, in my opinion, the 13th article of the act of Congress "for the better government of the navy" does not extend to officers *not* in command, but only to officers commanding. Each clause of the article preceding the last appears to refer exclusively to commanding officers; and the last fixes the interpretation as the true one, because it is the only part of the article which authorizes the punishment of any one of the officers denominated.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

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Title of the Brothertowns under the Menomonie Treaty.

TITLE OF THE BROTHERTOWNS UNDER THE MENOMONIE
TREATY.

Indians have not been conceded the natural capacity to hold absolute title to lands, except in cases specially provided for by treaty; wherefore, the title of the Brothertown Indians to the land secured to them by the treaties with the Menomonies is not a fee-simple, but only such a right of occupancy as was previously possessed by the Menomonies themselves.

ATTORNEY GENERAL'S OFFICE,

April 4, 1838.

SIR: In answer to the questions proposed in the communication of the Commissioner of Indian Affairs, referred to me by your letter of the 3d instant, I have the honor to inform you that, in my opinion, the title of the Brothertown Indians to the land secured to them by the treaties with the Menomonies is not a fee-simple, but only such a right of occupancy as was previously possessed by the Menomonies themselves, subject to the general right of the United States to extinguish it by treaty with the Brothertown Indians; and subject also, by a special provision in the 1st article of the treaty of February 8th, 1831, to the power of Congress and the President to alter it as they may think proper.

It is true that the condition proposed by the Senate, and adopted by the supplementary articles of October 27, 1832, declares that the land to be set apart for these Indians shall be "laid off and granted" for their use; and had the provision been for granting lands to individual Indians, there would have been great reason for holding that the grants to be made to them should be in fee. But the Indian tribes, under the policy of this government, in their natural capacity, cannot hold the absolute title to lands occupied by them, except when specially provided for by treaty; as in the case of the Choctaws, and others, who have been removed out of the limits of the States and Territories. The reason for giving to the word "grant," in the case of individuals, the liberal interpretation which has been mentioned, does not apply in the present instance; and, besides, it is expressly declared in the 1st article of the original treaty that the lands ceded "for the New York Indians are to be held by those tribes under such tenure as the Menomonie Indians now hold their lands, subject to such regulations and

Pay of Officers Commanding in a Grade above their Rank.

alteration of tenure as Congress and the President of the United States shall from time to time think proper to adopt." This provision does not appear to be affected, and certainly is not clearly abrogated, by the supplementary article. I am therefore led to the result above stated as the only safe conclusion on these articles.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

PAY OF OFFICERS COMMANDING IN A GRADE ABOVE THEIR RANK.

Officers thereunto authorized, commanding in a corps of militia or volunteers in the actual service of the United States in a grade higher than their rank in the army, are equitably entitled to the pay and emoluments of the grade in which they serve, and may be paid out of the appropriation for the pay of militia and volunteers.

The same result may be produced by allowing it out of the army appropriation, and allowing the difference between that and the grade in which they serve.

ATTORNEY GENERAL'S OFFICE,

April 6, 1838.

SIR: In answer to the questions proposed in the report of the Second Comptroller, referred to me by your letter of the 28th of December last, I have the honor to state that when an officer of the army accepts and exercises a command in a corps of militia or volunteers in the actual service of the United States, conferred on him by competent authority, and higher in grade than his rank in the army, he is, in my opinion, equitably entitled to the pay and emoluments of the grade in which he serves. I think, too, it may be paid out of the appropriation for the pay of militia and volunteers; but, if this be done, he cannot claim the pay and emoluments of his army rank. The same result might be produced by allowing him the army pay and emoluments, out of the army appropriation; and, in addition thereto, allowing the difference between that pay and the pay of the grade in which he serves. If this course be adopted, the amount of the difference ought to be paid out of the appropriation for the service of the militia or volunteers.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Extra Compensation to Clerks for Extra Services.

NAVY PENSIONS.

Under the act of 1837 it is, but under the acts of 1813 and 1814 it is not, necessary to be made to appear that the death occurred in the naval service, provided it appear to have been occasioned by a wound received whilst in the service and line of duty.

ATTORNEY GENERAL'S OFFICE,

April 6, 1838.

SIR: In reply to the question arising in the case of Peter Gordon, and proposed by your letter of the 6th of February, 1838, I have the honor to state that, in my opinion, the first section of the act of the 3d of March, 1837, is confined to cases where the death occurred whilst the person was in the naval service. But, under the navy pension act of January 20th, 1813, and the second section of the like act of the 4th of March, 1814, it does not appear to me that the death need occur in the naval service, provided it be proved to have been occasioned by a wound received whilst in the service and in the line of his duty.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

EXTRA COMPENSATION TO CLERKS FOR EXTRA SERVICES.

Clerks, whose ordinary duties are prescribed by law, or by the head of the bureau in which they are employed under the authority of law, who perform services additional to those which are in their line of ordinary duty, are equitably entitled to a just compensation therefor.

Services thus rendered the government must be regarded as wholly extra-official.

ATTORNEY GENERAL'S OFFICE,

April 6, 1838.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th of December last, requesting my opinion on the claim of William Hunter, a clerk in the office of the Fourth Auditor, for extra compensation for services rendered the navy pension fund.

The papers do not give so precise a statement of the nature

Duties and Authority of Collectors of Customs.

of this case as to enable me to express a decided opinion whether Mr. Hunter is legally entitled to the allowance claimed. If the regular and ordinary duties of Mr. Hunter as a clerk were—1. Either prescribed by express statutory provision; or, though not expressly provided for by statute, were prescribed by the Auditor, under the authority of law; and if those duties as thus prescribed did not include the services rendered to the navy pension fund; and if, 2d. Besides performing such regular ordinary duties, he also performed such additional services;—I think he is equitably entitled to a just compensation therefor, because they must be regarded as wholly extra official. But, unless these requisites concur, I think no extra compensation can be allowed.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

DUTIES AND AUTHORITY OF COLLECTORS OF CUSTOMS.

It is not a breach of official duty on the part of collectors to refuse to report their reasons for removing their subordinate officers.

By analogy to the power of removal exercised by the President, collectors may remove their subordinates without consulting the Secretary of the Treasury, though the approbation of the latter be necessary to an appointment.

ATTORNEY GENERAL'S OFFICE,

April 30, 1838.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th instant.

Under the circumstances, it does not appear to me to be proper to re-examine, in this office, the question discussed in the opinion of my predecessor referred to in your letter; especially as that opinion was given on full and deliberate consideration, and appears from your letter to have been satisfactory to the department, and agreeable to its former and subsequent usage.

That part of the circular of the 20th of July, 1829, which requires the collector, whenever the removal of any subordinate officer employed by him is thought necessary, to report his *reasons* therefor, does not seem to me so far authorized by law,

Location of the Cherokee Reserves.

as to make the omission or refusal to report such reasons a breach of official duty on the part of the collector.

The approbation of the head of the Treasury Department is necessary to the *employment* of the officers in question, by the express provisions of the acts of 1799 and 1815; but nothing is said of their removal. By necessary implication, however, and in analogy to the constitutional power of removal exercised by the President, the collector has the like power; and as the law does not require him to state the cause of removal, nor even require it to be done with the approbation of the Secretary of the Treasury, I do not see that the latter has any legal authority to call for the reasons on which the collector proceeds. Where a new appointment is to follow, the reasons of the removal may be useful to the Secretary in deciding whether or not the new appointment shall be approved; and, in ordinary cases, a due regard to the harmony of the public service, and the respect due to the superior officer, would seem to dictate a compliance with such a call. On the other hand, cases may easily be imagined where the public interest may strongly demand a removal, and where yet the collector, without any violation of official comity, may very properly withhold the reasons of his action. But, whatever may be the motive or character of the refusal to assign such reasons, his legal right to withhold them appears to me to be very clear.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

LOCATION OF THE CHEROKEE RESERVES.

Under the treaties of 1817 and 1819, with the Cherokees, the reservees therein could not properly locate their lands outside the limits of the cessions, respectively; but, as some of the reservations of 1817 were located within the lands ceded in 1819, and were included in the uncaded lands under the latter treaty, these cases are to stand on the same ground as other reservations under the treaty of 1817, and equally entitled, under the treaties of 1835 and 1836, to compensation with those who located within the cession of 1817.

But no provision has been made for those whose reservations, under treaties of 1817 and 1819, were located within the cessions of 1835 and 1836; and, as such reservations are not within the 13th article of the treaty of 1835-'36, they were unauthorized, and are not to be paid for as improved lands; but the holders are only entitled to pay for their improvements.

Location of the Cherokee Reserves.

Reservations claimed under former treaties, not being ceded by the first article of the last, are not within the words nor intentions of the 9th article of the last; hence the reservees who may be entitled to compensation under the 13th, cannot claim pay under the 9th article for improvements on the same reservations.

But those who were to receive grants for their reservations are entitled to pay for the soil and their improvements thereon.

The children of the reservees, under the 8th article of the treaty of 1817, were entitled to reservations in fee-simple.

ATTORNEY GENERAL'S OFFICE,

May 14, 1838.

SIR: Pursuant to the request contained in your letter of the 20th ultimo, I have considered the questions stated in the communication of the Commissioner of Indian Affairs, and in the accompanying documents.

It is stated by the Commissioner that some of the reservees under the Cherokee treaties of 1817 and 1819 have made locations within the limits of the cession made by the treaty of 1835-'36, and have received payment for their improvements on the same lands, and perhaps on the lands within that cession. It is now urged on their behalf, that they should also be paid, under the 13th article and the supplementary article, the value of their reservations as unimproved land. And the Commissioner desires to be informed whether the reservees under the treaties of 1817 and 1819 might properly locate their lands *without* the limits of the cessions of those years; and if so, what rights they possess under the treaty of 1835-'36—especially whether they can claim pay for improvements, and for their reservations as unimproved lands; and, also, in what respects, if any, their rights differ from those of the reservees under the old treaties, who located on the cessions made by those treaties. The Commissioner also desires my opinion in regard to the rights of the children of these reservees.

1. Under the treaties of 1817 and 1819, I am of opinion that the reservees provided for therein could not properly locate their lands *without* the limits of the cessions of those years, respectively. The last proviso of the 8th article of the treaty of 1817 (which gives the reservations of that treaty) expressly declares that the land which may be reserved under that article shall "be deducted from the amount which has been ceded under

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the 1st and 2d articles of the treaty;" and the whole scope of the treaty of 1819 shows that the reservations provided for therein are to be taken within the territory then ceded. But it would seem from the 13th article of the treaty of 1835-'36, that some of the reservations given by the treaty of 1817 were located within the territory ceded by the treaty of 1819, and in the latter treaty were included in the uncaded lands belonging to the nation. Cases of this description are, however, by the treaty of 1835-'36, to stand on the same ground as other reservations under the treaty of 1817; and these reservees, by the 13th article of the treaty of 1835-'36, are, equally with those who located within the cession of 1817, entitled to compensation.

2. I do not perceive that any provision is made in the treaty of 1835-'36 for persons entitled to reservations under the treaties of 1817 and 1819, who had located such reservations *within* the limits of the cession of 1835-'36; and, as already stated, I do not think the locations so made were authorized by the treaties of 1817 and 1819; consequently, reservations of this kind are not within the 13th article of the treaty of 1835-'36, and are not to be paid for as unimproved lands under that article and the supplement thereto. But, under the ninth article, the holders of these locations are entitled to pay for their improvements, because those improvements are on lands within the limits of the cession.

3. The 9th article of the treaty of 1835-'36 evidently refers to improvements made on the lands ceded to the United States by the 1st article of that treaty; which being all the lands within the boundaries described in the treaty, held by the Cherokee nation in its collective capacity, and under the original Indian title. Reservations lawfully held by individuals under the treaties of 1817 and 1819, not being ceded by the 1st article of the last treaty, are neither within the words nor the intention of the 9th article; and, therefore, as already stated in my opinions of the 6th of December and 3d of February last, the reservees who may be entitled to pecuniary compensation under the 13th article and the supplementary articles, cannot claim pay under the 9th article for improvements on the same reservations.

Extra Compensation to Clerks for Extra Services.

But it appears to me, however, that the reservees of the third class mentioned in the opinion of the 6th of December—viz: those who were to receive grants for their reservations—are entitled, under the supplementary article, to pay for their improvements as well as the soil. By the original 13th article, they were to receive grants for their reservations, which would have secured to them an absolute estate in the land, with the improvements; and, as the \$600,000 given in the 3d supplementary article is to be in lieu of the reservations, I think the whole value of those reservations, improvements included, should be made good to the reservees. The reservees of the first and second classes mentioned in the opinion of the 6th of December, stand on entirely different ground. The original 13th article only gave them a compensation equal to the present value of the reservation as unimproved lands; and they are, therefore, under the supplementary article, restricted to the like compensation.

The children of reservees under the 8th article of the treaty of 1817 were entitled, by the express words of that article, to reservations in fee simple. The father having only a life estate, the estate of the children could not be divested by any act of the ancestor; and if they have been obliged, by the laws of the States, to abandon their reversionary rights, or to purchase them from the States, they will be entitled to compensation. The reservees provided for by the treaty of 1819 were to hold in fee-simple; their children have, therefore, no claim except as heirs.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

EXTRA COMPENSATION TO CLERKS FOR EXTRA SERVICES.

Clerks in the Fourth Auditor's office are entitled to a fair compensation for services performed by them in relation to the navy pension and navy hospital funds, provided those services are not within the range of the powers and duties assigned by law to the office of the Fourth Auditor.

Extra Compensation to Clerks for Extra Services.

The same rule for ascertaining whether services were extra-official, as was laid down in the opinion given on the 6th of April, 1838, should be applied.

ATTORNEY GENERAL'S OFFICE,
May 24, 1838.

SIR: Pursuant to your request, I have examined the statement marked No. 2, enclosed in your letter of the 2d instant, relative to the claim of Mr. Hunter for extra compensation, and proceed to state my opinion thereon.

Mr. Hunter alleges that he has performed a large portion of the duties which by the act of the 10th of July, 1832, were imposed on the clerk of the navy pension and navy hospital funds, appointed under that law; and refers to my opinion in the case of Mr. Ragsdale, in support of his position. The expression in that opinion, that Mr. Ragsdale, "as a clerk appointed under the act of July 10, 1832, was undoubtedly bound, for the legal salary, to perform *all* the clerical duties appertaining to the funds mentioned in the law," on which Mr. Hunter relies, was perfectly correct in reference to that case; but when it is to be applied to the present, the words of the act, "which shall be *required* of him in relation to said funds," must be remembered, and particularly considered. When this is done, I think the true construction of the law is, that the clerk is to perform all the clerical duties appertaining to the funds in question, which he shall be *required* by the Secretary of the Navy to perform; and that it does by no means follow, that *some* duties appertaining to those funds may not rightfully be imposed on, and performed by, other clerks. If the special clerk authorized to be appointed under the act of 1832 could not discharge *all* the duties, the necessity of the case would justify the imposing of such duties as he could not perform on some other clerk; and if, by the regular course of proceeding under the system of accounting established by law and by the usage of the department, some of the clerical duties appertaining to those funds could not be performed *in the office of the Fourth Auditor*, then also these last-mentioned duties are to be performed, not by the navy pension and navy hospital clerk, but by some clerk in the Fourth Auditor's office.

Appointment of Markers of Imported Goods.

Mr. Hunter's claim is entirely distinguishable from that of Mr. Ragsdale. The latter performed all the duties appertaining to the funds mentioned in the act of 1832, which were required of him; and also performed certain duties in relation to the coast-survey—duties which were not within the purview of his office as created and defined by law, and which were clearly extra-official. Mr. Hunter has performed certain duties in relation to these funds, in the Fourth Auditor's office; and on the law as above construed, I cannot say that any of these duties were extra-official, though I should think that if any of them were not included within the range of the powers and duties assigned by law to the office of the Fourth Auditor, they could not properly be imposed by him on any of his clerks. This brings the case to the point stated in my opinion of the 6th ultimo, which will be found to be in accordance with the opinion in Mr. Ragsdale's case, and I think, also, with the decisions of the Supreme Court of the United States.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

APPOINTMENT OF MARKERS OF IMPORTED GOODS.

It is competent for the surveyor of a port to depute inspectors of the customs appointed by the collector of customs at the same port, with the approbation of the Secretary of the Treasury, to act as markers.

The practice that has prevailed in this respect since 1822 is erroneous, as the act of that year does not forbid the assigning to inspectors this duty.

ATTORNEY GENERAL'S OFFICE,

June 20, 1838.

SIR: I have had the honor to receive your letter of the 26th ultimo, with the documents enclosed therein, and will proceed to state my views on the question which, after examining the documents and the law, I suppose was designed to be referred to me, viz: "With whom is vested, by law, the power to appoint the officers of inspection usually called *markers*, on whom is imposed, by the 38th and 39th sections of the general collection act of the 2d of March, 1799, the duty of inspecting the landing of distilled spirits, wines, and teas, and marking casks

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chests, vessels, and cases containing the same—whether in the surveyor or the collector?"

It appears from the reports of the Comptroller of the Treasury, that from 1799 until the passage of the act of the 7th of May, 1822, "to establish the compensation of officers of the customs, and to alter certain collection duties, and for other purposes," the duties in question were performed by inspectors of the customs appointed originally under section 21, by the collector, with the approbation of the Secretary of the Treasury; but specially deputed by the surveyor, under section 38, to perform these duties; and that, when so deputed, they were regarded by the department as officers of inspection, or deputy inspectors of the revenue, under the general superintendence and direction of the surveyor or inspector of the revenue.

I assume that this exposition of, and this practical usage under, the act of 1799 were correct; and, indeed, after so great a lapse of time, it would be improper now to overhaul them, more especially as they do not appear to have been questioned by the department, or in any other quarter. If, therefore, this part of the act of 1799 has not been varied by any law since passed, I shall take it for granted that the construction first given to it ought still to be adhered to. The 14th section of the act of May 7, 1822, provides, that in the port of New York, and in certain other ports, "no person shall be an *inspector* who at the same time *holds any other office* in the collection of the customs in either of the said ports." At the time of the passage of this act, the persons employed in the special duties above named had acquired in the larger ports the appellation of *markers*, though it was not until 1836 that they were ever spoken of in any act of Congress by that name. Immediately after the law of 1822 the question arose, whether the section above quoted prevented the further employment of inspectors of the customs in the enumerated ports to perform the duties in question; and it appears from the documents before me that Comptroller Anderson decided that it had that effect. He also held that it did not deprive the surveyor of the power of *deputing* persons to act as officers of inspection or deputy inspectors of the *revenue*; but as no inspector of the customs could act in that capacity in the enumerated ports, he came to the con-

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clusion that the original appointment belonged, from the necessity of the case, wholly to the surveyor. Since that decision, it appears that the surveyors in the enumerated ports have appointed the inspectors or markers referred to, exclusively of any intervention by the collector, and without submitting such appointments to the Secretary of the Treasury. The accuracy of this decision, and of the usage founded upon it, has recently been questioned by the collector of the port of New York; and his views have been presented to your department in a very full argument, supported by an opinion of the district attorney of the southern district of New York; but, after mature consideration, the present Comptroller of the Treasury has reaffirmed the decision of his predecessor, and expressed a decided opinion that the appointment belongs exclusively to the surveyor. I infer, however, from your letter, that the reasoning of the Comptroller is not entirely satisfactory to your mind, inasmuch as you state that the department itself has doubts as to the correctness of the practice which has latterly obtained. This consideration has led me, in my examination of the subject, to treat the question as if it had now for the first time arisen under the act of 1822, and to lay out of view the usage had under it. After a careful and deliberate examination of the subject, I am of opinion that the 14th section of the act of May 7, 1822, does not in its true construction forbid the assigning to inspectors of the customs of the duties to be performed under the 38th and 39th sections of the act of 1799; and, consequently, that this subject still remains, in respect to the enumerated ports, as well as the other ports, on the same footing on which it stood prior to the passage of the act of 1822. I found this opinion on the following reasons:

1. The section, when it speaks of any "other office," can only refer to distinct and known offices created by law, and existing in May, 1822.

2. The duties of inspecting and marking, to be performed under the 38th and 39th sections of the act of 1799, were not in 1822 a distinct and known office created by law. These duties are merely functions to be performed by officers created by former sections of the act of 1799, and devolved on them by sections 38 and 39—for the very reason, as would seem, that Congress did not then think it necessary to create a dis-

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inct office for the sole purpose of marking casks, &c., containing imported spirits, wines, and teas.

3. No power is given in the act of 1799 to make an original appointment to any officer, except that by section 22 he is authorized, with the collector and naval officer, to exercise his functions, powers, and duties, "in cases of occasional and necessary absence, or of sickness, and not otherwise," by deputy, to be constituted under his hand and seal. The deputy so appointed may undoubtedly perform the duties specified in the 38th and 39th sections, which may also be lawfully performed by the surveyor himself; but the uniform construction, as I understand, of the act of 1799 has been, that it authorizes the appointment of only one deputy for each of the officers named in section 22; and since the act of the 3d March, 1817, which empowers the collector, (but neither of the other officers,) with the approbation of the Secretary of the Treasury, to employ a plurality of deputies, it must be considered as settled, beyond controversy, that the surveyor can only appoint a single general deputy. And it was probably in consequence of the presumed inability of the surveyor and his general deputy to perform, especially in the larger ports, the several duties prescribed in the 38th and 39th sections, that Congress authorized the surveyor to depute and employ for that purpose such of the inspectors of the customs as he might think proper. If, therefore, the 14th section of the act of May 7, 1822, prohibits the further employment of inspectors of the customs in these duties, I do not see that the consequence supposed by the Comptroller, (Anderson,) viz: that the surveyor must have the power of deputing persons in their stead, would follow. On the contrary, if the inspectors of the customs can no longer be employed, it would seem that the duties must be performed by the surveyor himself, or by his general deputy, until Congress shall make further provision on the subject.

4. It is against all sound rules of interpretation to consider a statute repealed by implication, except when the implication is unavoidable; and still more objectionable to claim by implication a power of appointment. There is the more force in the application of these rules to this case, inasmuch as Congress, in the act of 1799, have not given an absolute power of appoint-

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ment to any one of the officers connected with the customs, except in the case of their general deputies. The power of appointing weighers, gaugers, measurers, and inspectors, given in express terms to the collector, is carefully subjected to the supervision of the head of the Treasury Department, without whose approbation no one of those officers can be appointed. Had the duty of marking, under the 39th section, then been regarded as sufficiently important to require the creation of a distinct office of marker, it is to be presumed that his appointment would have been placed on the same footing as that of analogous officers: that is to say, that it would have been conferred on the collector, subject to the approbation of the department. It is a formidable (and, as I think, conclusive) objection to the implied power given by the decision of 1822 to the surveyor, that it not only repeals by implication, and without due necessity, the provisions of the act of 1799; but withdraws from the supervision of the department the appointment of those officers, contrary to the original design of Congress, evinced by the act of 1799, and never since clearly relinquished.

It, therefore, appears to me that the construction given by the Comptroller in 1822 to the fourteenth section of the act of May 7, 1822, was erroneous.

I have looked through the laws subsequent to 1822, but do not find any provision varying the state in which the subject then stood. The allusion in the appropriation act of July 4, 1836, to persons employed to perform the services in question, by the name of "*markers*," was not intended to create, and is insufficient to create, a distinct office; and the like remark is applicable to a similar mention of them contained in the appropriation act of March 3, 1837.

Although I have come, with satisfaction to my own mind, to the conclusion above stated, I think it proper to add, (having reference to the difficulty of the subject and the usage that has prevailed since 1822,) that this is one of those cases in which an explanatory law may, with great propriety, be solicited from Congress.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

Entry of Back Lots in Louisiana.

ENTRY OF BACK LOTS IN LOUISIANA.

The right to enter back lots is not limited to proprietors whose lands front on navigable streams. If there be a perennial flow of water, they may be rivers, creeks, bayous, or water-courses, within the meaning of the law. (See Roman Civil Law, Digest, book 43, title 12.)

ATTORNEY GENERAL'S OFFICE,

July 3, 1839.

SIR: In the case of Francis Surget, some time since referred to me for my opinion, under the act of June 15, 1832, authorizing the inhabitants of Louisiana "to enter the back lots," it appears that his application for such lots has been denied on the ground that they are reported as fit for cultivation and as bordering on a bayou; and, therefore, within the first proviso, which declares that the right of pre-emption "shall not extend so far in depth as to include lands *fit for cultivation* bordering on another river, creek, bayou, or water-course." Mr. Surget, however, alleges that the bayou in question is at no time navigable, is nearly dry in the summer months, and is fast filling up; and he therefore objects that it is not such a stream or water-course as is contemplated by the proviso; and the question proposed to me is, Whether, if such be the character of the bayou, the lands bordering on it will be excluded from entry as back lots?

The description in the enacting clause of the act of June 15, 1832, is precisely the same as that in the proviso above quoted; the right to enter back lots being only given to the owners of lands "bordering on any river, creek, bayou, or water-course."

The construction of the words, whether with reference to the enacting clause or to the proviso, must, therefore, be the same. And the counsel for Mr. Surget have cited numerous laws of a similar description, previously passed, in which the same phraseology has been used, and have submitted various arguments to show that by these several terms Congress has always intended *navigable* streams, and no others. There is much force in these arguments. But I do not find the word "*navigable*," or any equivalent word, in any of these laws; and have not sufficient evidence of the practical construction given to them to derive any aid from this source. After ma-

Pay of Officers Serving in a Grade higher than their Rank.

ture consideration, I cannot think it consistent with just rules of construction to restrict the benefits of the act of 1832 to those persons whose lands front on water-courses which are navigable, and to exclude from the enacting clause those proprietors whose lands border on unnavigable streams. But, though I cannot think it proper to interpolate the word "*navigable*" in this statute, I am clearly of opinion that, unless there be a perennial flow of water, the stream cannot be a "river, creek, bayou, or water-course," within the meaning of the law. The facts of the present case not being distinctly presented, I cannot say whether the bayou in question is of this latter character; and will merely add, that the distinctions laid down in the Roman civil law (Digest, book 43, title 12,) are probably as accurate as any that can be stated. According to them, to constitute a river or other running stream, as contradistinguished from a torrent or temporary water course, the flow of water must be perpetual—during the summer as well as in the winter; though if a stream, which usually flows during summer as well as winter, happens to be dried up during summer by some special cause, it will not the less be perennial. And so, on the other hand, if a stream which usually flows only during winter happens to run during a particular summer, it must yet be considered a mere torrent.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

PAY OF OFFICERS SERVING IN A GRADE HIGHER THAN THEIR RANK.

An officer who, in point of fact, temporarily performs the duties belonging to an office of higher grade, is entitled to the compensation allowed to such higher grade, even though his appointment may not have conformed in all respects to the requirements of the regulations.

Any office in the service is higher in grade than any other office the pay of which is less, however disconnected it may be.

ATTORNEY GENERAL'S OFFICE,

July 10, 1838.

SIR: In answer to the questions proposed to me in the case of Charles L. Wood, referred to me by your letters of the 18th

Pensions to Widows and Orphans of Navy Officers.

and 25th of May last, I have the honor to state that, in my opinion, an officer who, *in point of fact*, temporarily performs the duties belonging to an office of higher grade, is entitled to the compensation allowed to such higher grade, even though his appointment may not have conformed in all respects to the requirements of the regulations. Those requirements are directory to the officers having the power of making the temporary appointments; and their omission to pursue them may, in some cases, not only subject them to censure, but invalidate the acts of the person performing the duties of that higher grade. As a general rule, however, his acts will be valid, if he performs them under the direction of his immediate commander; and so that he *actually* performs the duties of the grade to which he is assigned by that commander, I think he is entitled, under the act of 1835, to the pay of that grade.

I am also of opinion that it is not necessary there should be a direct gradation or connexion between the two offices. Any office in the service is higher in *grade*, within the meaning of this law, than any other office, however disconnected, the *pay* of which is *less*.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

PENSIONS TO WIDOWS AND ORPHANS OF NAVY OFFICERS.

Upon a re-examination of the several acts giving pensions to the widows and children of officers having died of wounds received whilst in the line of their duty, it is **DECIDED** that the death must have occurred whilst the officer was in service in order to entitle the widow and children to the bounty.

ATTORNEY GENERAL'S OFFICE,

July 10, 1838.

SIR: I have had the honor to receive your letter of the 15th of May last, in relation to the case of Peter Gordon, and other cases arising under the navy pension laws.

Supposing, when I entered on the examination of the case

Pensions to Widows and Orphans of Navy Officers.

of Gordon, as presented in your letter of the 6th of February, that the question must have been settled by the practice of the department, I called on the experienced chief clerk, Mr. Boyle, for information on this head; and understood him to say that instances had occurred, many years since, in which pensions had been allowed to the widows and children of persons who, after their discharge from service, had died of wounds received in the line of their duty before their discharge. There being nothing in the acts of 1813 or 1814 which *expressly* confined the death to the period of service; and conceiving, too, that a seaman who receives a wound in the line of his duty, just before the expiration of his period of service, which proves fatal after that period, is within the general equity of the system; I was desirous to sustain, so far as I could, the liberal interpretation of the acts, which I understood had been given by the department in former cases. This explanation will, in some measure, account for the guarded manner in which my reply was drawn.

The several provisions referred to in your letter of the 15th of May are certainly calculated to excite doubts as to the correctness of the impression stated in my former communication; and I have, therefore, re-examined the case, and, on looking into all the laws which relate to the general subject, and considering the force of the word "*officer*" in the act of January 20, 1813, and of the word "*belonging*" in the second section of the act of March 4, 1814, I am of opinion that, on the true construction of the acts in question, the death must take place while the party is in service. If he dies after his discharge, it is not "an officer of the navy or marines," nor "an officer, seaman, or marine *belonging* to the navy of the United States," who is killed or dies; but a person who *has been* such officer, seaman, or marine. The idea that the death must have occurred in the service, was evidently entertained by Congress, when they passed the continuing acts of May 23, 1828, and June 28, 1832, which may be regarded as a legislative construction of the acts of 1813 and 1814; and when, in addition to this, we have the express provision of the act of March 3, 1817, confining the death to the period of service, I am now satisfied (though I confess I see no great justice in such a re-

Forage, and Equivalents in Money.

striction) that these acts were intended to be confined in the same way.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

FORAGE, AND EQUIVALENTS IN MONEY.

A captain, entitled to keep three horses only, can only draw forage in kind, or claim an equivalent in money, for that number; and if he draw for horses belonging to the United States, it must be deducted from that number.

ATTORNEY GENERAL'S OFFICE,

July 11, 1838.

SIR: I have considered the claim of Captain Fowle, referred to me by your letter of the 27th ultimo.

Assuming that *three* horses are all which the rank of Captain Fowle entitled him to keep, and I should then be of opinion that he can only draw forage in kind, or claim an equivalent in money, for that number in the aggregate; and that the horses for which he drew forage in kind, whether belonging to the United States or to himself, must be deducted from the aggregate number. I cannot think the law intended to permit an officer to draw forage in kind, for one or more horses belonging to the United States; and then to claim an equivalent for forage in money, for the whole number of horses he may be entitled to keep, although he may actually keep that number in addition to the government horse or horses employed by him.

It appears, however, by the Auditor's endorsement, that the paymaster general is inclined to think that the claim should be allowed. He is certainly much better qualified to decide on a question of this kind, than any mere lawyer can be; and if the point has been settled by the usage of the army, the doubts above expressed ought not, perhaps, to deprive Captain Fowle of an emolument enjoyed by army officers.

I have the honor, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Qualifications of Banks for Deposites.

QUALIFICATIONS OF BANKS FOR DEPOSITES.

All banks are disqualified to be selected as banks of deposit which shall have issued or paid out any note or bill of their own or other banks of a less denomination than five dollars.

ATTORNEY GENERAL'S OFFICE,
July 13, 1838.

SIR: In reply to the question proposed to me in your letter of the 11th instant, I have the honor to state, that, in my opinion, the issuing and paying out of the notes or bills of other corporations besides banks, or of individuals, of a less denomination than five dollars, will disqualify any bank for selection, under the act of June 23, 1836, as a depository of the public money. The clause of the fifth section of that law, on which the question arises, is framed in general terms; it prohibits the employment of any bank which, after the 4th of July, 1836, shall have issued or paid out "*any* note or bill of a less denomination than five dollars;" without saying whether such notes or bills shall be those of the bank itself, or of any other bank, or the notes or bills of other corporations or of private bankers. The design of the provision evidently was, to prohibit the employment of those banks which should put in circulation any notes or bills of any description whatever, to be passed and circulated as money, of a denomination less than five dollars; and to prevent evasion, as well as to comply with the general terms of the law, it must be held to apply to every bank which, after the time fixed by law, shall issue or pay out any note or bill of the prohibited denominations, no matter by what authority or by whom such note or bill may have been made.

I am, sir, &c., &c.,

B. F. BUTLER

To the SECRETARY OF THE TREASURY.

Allowances to Commanders of Marines.

ALLOWANCES TO COMMANDERS OF MARINES.

An officer in the actual command of any number of men sufficiently large to constitute a detachment of marines, according to the usage of the Navy Department, will entitle him to the allowance given in the 2d section of the act of March 2, 1827.

ATTORNEY GENERAL'S OFFICE,

July 21, 1838.

SIR: In reply to the question proposed in your letter of the 17th instant, I have the honor to state, that, in my opinion, the actual command of any number of men sufficiently large to constitute, according to the usage of the Navy Department, a *detachment* of marines, will entitle the commander, who is responsible for the care of their clothing, &c., to the allowance given in the 2d section of the act of March 2, 1827, the benefit of which section was extended to the marine corps by the act of June 30, 1834. The opinion to which the Second Comptroller refers, was in part founded on the fact that in the act of 1798, organizing the marine corps, the word "*detachment*" is used as substantially synonymous with "*company*;" and in accordance with this idea, I think that any body of marines large enough to constitute a detachment, according to the usage of the service, and actually known and regarded as such, whether its numbers be equal to the legal complement of a company of infantry, or be less than that, must be deemed a *detachment* or *company* for the purposes of the present question.

As I know of no precise limit to be assigned to a detachment of marines, I cannot give a more definite answer to your question; and I trust the general rule above stated will be found amply sufficient to dispose of the subject.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY.

Duty of President, Register, and Receiver, &c.

DUTY OF PRESIDENT, REGISTER, AND RECEIVER, IN RESPECT TO DE FERIOT.

The register and receiver, under the power given to them in the 12th section of the act, may examine the claim of De Feriot, and the evidence on which it was founded, for the purpose of ascertaining whether it was founded on a real or fabricated grant, and also for the purpose of ascertaining whether or not the confirmation was fraudulently obtained; and, if satisfied that fraud has been practised, they ought not to make the survey nor issue the certificate.

The President may withhold a patent in such case, even though a certificate shall have been issued.

In case of an equitable claim in favor of an innocent purchaser, the land should be reserved from sale in order to give him opportunity to apply to Congress.

ATTORNEY GENERAL'S OFFICE,

July 21, 1838.

SIR: It appears from the documents in the De Feriot case, referred to me by your letter of the 2d of May last, that the register and receiver, who had been applied to for a survey and certificate under the 12th section of the act of March 3, 1819, have declined making the survey, or issuing the certificate, on the ground that the Spanish grant produced before the commissioners by De Feriot's agent was fabricated and fraudulent, and that the confirmation thereof was procured by fraud. It also appears that certain parties who have acquired De Feriot's title to a part of the tract confirmed to him by the commissioners, have applied to the General Land Office for an order on the commissioners to make the survey and issue the certificate, with a view of obtaining a patent for the portion claimed by them. They do not deny the suggestion of fraud, but allege that they are *bona fide* purchasers, for a valuable consideration, without notice of the fraud; that they purchased on the strength of the commissioners' confirmation; and have, moreover, made large and expensive improvements on the premises, the possession of which was transferred to them by De Feriot at the time of their purchase; and they therefore insist that, if a patent be necessary to complete their title, it ought to be issued to them, notwithstanding the discovery of the fraud charged upon De Feriot.

In the paper marked A, referred to in your letter, several questions are stated on which you request my opinion; but, as the matter now pending may be disposed of, so far as the de-

Duty of President, Register, and Receiver, &c.

partment is concerned, by a reply to the last of those questions, I shall confine myself thereto. It is asked, "whether the register and receiver ought to cause a survey to be made, and to issue a certificate, if satisfied of the existence of the fraud? and if the survey be made, and the certificate issued, whether the President ought to issue a patent?"

I incline to the opinion that the register and receiver, under the power given to them in the 12th section of the act, may examine the claim of De Feriot, and the evidence on which it was founded, for the purpose of ascertaining whether it was founded on a real or fabricated grant, and also for the purpose of ascertaining whether or not the confirmation was fraudulently obtained; and that if they are satisfied of the fraud alleged to have been practised in the present case, they ought not to be required to make the survey or issue the certificate. But, however this may be, I am clearly of opinion that, even if the certificate had been issued, it would still be competent for the department and the President to withhold the patent, provided they shall be satisfied that the claim was founded in, and confirmed by, fraud. The discovery of frauds of this nature has always been regarded in this office, and I believe also in the General Land Office, as a sufficient reason for suspending the emanation of the patent (even though it may be applied for by a purchaser not implicated in the fraud) until a judicial investigation can be had, or the direction of Congress be received. If there be any doubt in point of fact as to the existence of the alleged fraud, it would seem to be the duty of the United States to institute some judicial proceeding in which the subject can be investigated and decided; and, if there be equitable claims on the part of the purchasers not connusant of the fraud, it would be proper not to offer the lands for sale until opportunity shall have been afforded to such purchasers to apply to Congress in the premises.

Among other grounds insisted on by the agent of the present applicants, it is claimed by them that, under the act of 1819, the legal estate was vested in De Feriot, and that purchasers from him now hold that title, and may protect themselves on the ground that they had no notice of the alleged fraud. If the legal title passed by the act of 1819, and has come to the

Accounts and Accounting Officers.

present claimants, as contended, it cannot be necessary to the formal completion of their title that they should receive a patent. The argument, therefore, if well founded, proves too much for the present application, which is for a *patent*; and for that reason, as well as the reason above stated, I forbear to enter into the question.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

ACCOUNTS AND ACCOUNTING OFFICERS.

The accounting officers of the treasury may allow an account, if it be a just one, of Charles J. Ingersoll, district attorney of the eastern district of Pennsylvania, notwithstanding his having been sued by the United States for various bonds placed in his hands for collection, for moneys received thereon, and for other moneys, (his account not having been set off in the suit,) and a judgment recovered by the United States against him for \$3,975 78, the same as if it were presented prior to the institution of that suit, as the said account was a matter separate and distinct from the subject-matter of the suit, and a set-off not having been required to be made.

ATTORNEY GENERAL'S OFFICE,

August 6, 1838.

SIR: I proceed to state my opinion on the question proposed to me in your communication, transmitting for my examination the papers relating to a claim of Charles J. Ingersoll, esq., former district attorney of the United States for the eastern district of Pennsylvania; and which question, as stated by you, is, "whether the claim, if equitable and just, can be legally allowed by the accounting officer of the department?"

To understand the force of this question, and to be prepared to answer it accurately, we must first carefully attend to the circumstances out of which it arises, and to the present posture of the general matters of account with which it is connected.

It appears from the official communications from the office of the First Comptroller and the First Auditor of the Treasury, and the other papers referred to me, that Mr. Ingersoll stood charged on the books of the treasury with various large sums, for bonds placed in his hands for collection, and for moneys received thereon, and other moneys, from April, 1815, to April,

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1829; that he was credited on those books with sundry large sums from time to time accounted for to the United States; that he had presented various claims against the United States for settlement at the treasury, which had been disallowed by the accounting officers; and that, under these circumstances, a heavy balance appeared to be due from him to the United States. In this state of the accounts, Mr. Ingersoll, in September, 1830, by a letter addressed to the Comptroller, invited that officer "to lose no time in causing suit to be instituted against him, in order that the matter drawn in controversy might receive judicial determination;" and, as the accounts were suffered to remain unliquidated and without suit, Mr. Ingersoll, in 1836, again requested the Comptroller "that he would direct a suit to be brought without further delay." A suit was then instituted in the district court of the United States for the eastern district of Pennsylvania, and fully tried before Judge Hopkinson in March, 1837. On the trial, the district attorney claimed a balance, according to the treasury transcripts, of \$37,981 71 principal, and \$38,599 29 interest; or the aggregate sum of \$76,491. Mr. Ingersoll went into proof of the various credits which had been claimed by him at the treasury, and rejected by the accounting officers; and succeeded so far as to satisfy the jury that the United States were only entitled to recover \$3,975 78, for which sum they found a verdict for the plaintiffs.

As an offset to the debt established by this verdict, Mr. Ingersoll soon afterwards presented at the treasury an account against the United States, for attorney's fees in various suits instituted on duty bonds in the years 1827, 1828, and 1829; which fees were not collected from the parties, amounting in the whole to \$2,933 59, and claimed to be allowed this amount. On referring the account for taxation in detail to Judge Hopkinson, it was taxed by him at \$1,905 13. The ground on which this claim was made after the verdict stated, was, that the account had been rejected as a set-off at the trial, because it did not appear that it had been previously presented at the treasury and *disallowed* by the accounting officers; and, as the First Auditor of the Treasury had doubts whether credits could or ought to be allowed after trial and judgment, which, by

proper vigilance and attention, might have been given in evidence and adjudicated on the trial, he applied for instructions to the Comptroller. That officer decided that the claim, whatever might be its justice in other respects, could not, with propriety, be allowed by the accounting officers, even if they possessed the power to relieve in any case against the effect of a recovery. He observes, in his reply to the Auditor, that the verdict and judgment were conclusive upon the United States, so that no charge could be made by the accounting officers against Mr. Ingersoll upon any of the rejected items in the treasury report, on which the suit was founded; that, as the plaintiffs were thus concluded, there would be no justice or reciprocity if the defendant, after taking his chances with the jury, of reducing the plaintiff's claim, was afterwards allowed to set up other claims, and to receive credit therefor, which claims might have been presented in the suit; that the judgment being unappealed from, must be considered conclusive as to all matters in controversy in the suit upon which it was rendered; that the accounting officers have no authority to re-examine any of the matters so decided; nor to relieve from any supposed hardship which might ensue, especially where there had been no surprise, but abundant time and opportunity to obviate any such result; that, if the court erred in rejecting Mr. Ingersoll's claim, the law provided him an appropriate remedy; whilst, on the other hand, if its decision was correct, (as was admitted in the present case,) no authority short of Congress could give the relief sought by the defendant.

In addition to the differences of opinion between the claimant and the Comptroller, in respect to the power of the accounting officers, there is also a difference between them in regard to a question of fact. Mr. Ingersoll states that the claim for these costs had been presented by him at the treasury before the suit, but without proof; and that, for want of proof, it was disallowed by the accounting officers; that, being excluded from consideration at the trial, he was not allowed to offer his proof of its justice to the jury; and that it therefore never was passed upon by any officer, fiscal or judicial, until after the trial. The Comptroller, however, transmits a report from one of the officers of his department, who certifies that he cannot

Accounts and Accounting Officers.

discover that the bill of costs or claim now under consideration, being the abstract marked A, has ever been presented to the accounting officers for allowance or payment; and that the first intimation of the existence of the claim is to be found only in the notice given by Mr. Ingersoll to the district attorney, immediately preceding the trial of the cause, in the words—"Fees not taxed, but taxable."

It is not my province to settle questions of fact arising on papers referred to me; but, in the present instance, I think it proper to state, that, from the documents before me, neither of the above statements is precisely correct. It appears from the certified transcript of the account of Mr. Ingersoll, stated on the 30th of August, 1836, (which transcript was used at the trial, and is now in my hands,) that at the foot of the account is the following entry: "C. J. Ingersoll, esq., late United States district attorney, claims credit for the following sums, which are disallowed, viz:"—and then follow various claims for specific sums, with the reasons briefly stated for their disallowance; after which is the following: "Various attorney's fees due from the plaintiffs to defendant, not taxed, but taxable—amount believed to be ——," on which is the following remark of the accounting officer: "[no amount put down.]" It would appear, then, that a claim, in blank as to the amount, and without any specification as to items, was presented at the Treasury; but, not being followed up by specification or proof, it was neither allowed; nor technically disallowed, by the accounting officers.

It is more important to refer to what took place at the trial. It appears, by the certificate of Judge Hopkinson accompanying his taxation, that, on the trial of the cause, Mr. Ingersoll claimed several credits, or offsets, against the demand of the United States; that one of them was for "various attorney's fees due from the plaintiffs to the defendant, not taxed, but taxable; amount believed to be ——;" but no amount was carried out, but it was said the clerk would prepare the abstract if it would be admitted. The district attorney objected to the item, and to the admission of any evidence in support of it, on the ground that the credit, or account, had never been presented to the Treasury and disallowed, as was required by the 4th sec-

tion of the act of 3d March, 1797. After a full argument, the item was rejected on the ground taken by the district attorney. This decision was submitted to as correct, and the account was therefore wholly excluded from the consideration of the court and jury.

You now inquire whether the claim, supposing it to be equitable and just, can be legally allowed by the accounting officer?

After a very deliberate consideration of this question, I am of opinion that it should be answered in the *affirmative*.

The general principles, as stated by the Comptroller, are perfectly correct when applied to cases properly within them. For example: when money has been placed in the hands of a disbursing officer, and a suit is brought to recover the *balance* remaining in his hands, he should be prepared to bring forward and establish his credits on the trial; and if for any reason he omits to do so, I think the recovery must be regarded as conclusive by the accounting officers, and that the only relief for payments alleged to have been made and not allowed on the trial must be by application to Congress. But the reason for this is, that in the case supposed the suit necessarily includes the defendant's claims for credits, because such credits grow out of the transaction on which the suit is founded; and it is only for the balance, after deducting all payments, that the suit is brought. So, too, where the credit claimed is not of that description, but is founded on a distinct transaction, and therefore is to be regarded as a mere set-off; yet if the law allows it to be offered by way of set-off, and the defendant avails himself of it by bringing forward his claim, and is allowed to go into proof of it, and it is submitted to and passed upon by the jury, he will be concluded by the verdict and judgment; and the accounting officers should not undertake to grant relief.

But, in the present case, neither of these circumstances exists. The claim was not necessarily involved in the discussion of the subject-matter of action; it was a separate and distinct matter, for which the defendant, had the plaintiffs been suable, might have brought a cross suit, and which could be presented in the suit of the United States only as a set-off. As it was not al-

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lowed to be discussed in that action as a set-off, the defendant, on legal principles, is not concluded by the recovery. Even if the judge erred in excluding the set off, the defendant was not bound to except to his decision, and to take measures to correct it; because it is always optional with the defendant to avail himself of a set-off, or to reserve it for a cross-action. The fact that he proposed to present his proofs of his rights to the set off in the first action does not preclude him from bringing the cross-action; provided, in point of fact, he was not allowed to present such proofs, and the subject was never passed upon by the jury.

The only difficulty, in the present case, which can prevent the defendant from bringing his action to recover whatever may be justly due him on the account in question, arises from the fact that the United States are not liable to be sued. This immunity, however, does not alter the general principle of law applicable to the subject; nor is it ever regarded in the accounting offices as justifying the rejection of a claim which, as between individuals, would be just and legal. But I think it may properly be used by the officers of government to suspend the payment of claims which, though technically legal, are deemed unjust, until Congress shall have been applied to for directions on the subject. Whether such a course should be taken in respect to the claim of Mr. Ingersoll, is not a question for this office—if, indeed, there be any room for raising any such question on this claim; and I have no hesitation in saying, that if the claim be deemed by the accounting officers equitable and just, and such a one as they would have allowed had it been presented in its present form prior to the institution of that suit, they are not precluded, by a recovery in that suit, from allowing it now.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

CONFIRMATION OF LAND CLAIMS IN MISSOURI.

The individual who appeared before the board of commissioners, and whose claim was favorably reported upon by them, (not the original grantee,) is to be regarded as the confirmer under the act of July 4, 1836, and is authorized to make the location.

Confirmation of Land Claims in Missouri.

Patents are unnecessary to complete title to an unsold portion of the confirmed claim. A grant may be as effectually made by law as by a patent issued in pursuance of law.

The location spoken of in the 2d and 3d sections of the act must be confined to one land district and made at one time; but the party may enter separate tracts, conformably to legal divisions and subdivisions, for which a patent must be issued.

ATTORNEY GENERAL'S OFFICE,

August 6, 1838.

SIR: In the communication of the Commissioner of the General Land Office, referred to me by your letter of the 9th of April last, the following questions arising under the act of the 4th of July, 1836, "confirming claims to land in the State of Missouri, and for other purposes," are presented for my consideration:

"1. Where it appears by the reports that a claim is presented by an individual, as the assignee or legal representative of the original grantee, which is to be recognised as the confirmee—such person, or the original grantee?

"2. In case of such interferences as are contemplated by the second section of the act, must the new location be made in the name of the persons claiming before the commissioners as the legal representatives of the original grantee, or in the name of such grantee; or can they be located in the name of the subsequent assignee?

"3. Must the whole of the quantity authorized to be located by one claimant under the second section of the act be located in one body, or can it be located in detached portions; and if such detached portions can be located, must the location be confined to one land district, or may it be made in different districts?

"4. Must a patent be issued for the part of the original claim not interfered with by other recognised rights, and should a separate patent be granted for the new locations authorized by the 2d section? and if such new locations are not to be made in one body, but in detached tracts, is a patent to be issued for each separate tract; or must the whole case be suspended until the entire new location is made, and then but one patent be issued, including the part of the original claim not disposed of, as well as the new locations?

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“5. If it should be decided that the new locations must be made in the name of the original grantee, what kind of evidence should be produced to the land officers, to show the right of the party applying to make his new location ?

“6. If it be decided that the quantity to be located may be located in detached tracts, and in different districts, what measures should be adopted to prevent a greater quantity being located than what the party is entitled to ? and can any limitation be made as to the time in which such a new location must be made and returned to this office ?”

In answer to the 1st, 2d, and 5th of the above questions, I have the honor to state that, in my opinion, the individuals who appeared as claimants before the commissioners, and who have obtained their favorable decisions, are the persons who are to be recognised at the General Land Office as the confirmees under the act of the 4th of July, 1836; and that the same persons, and those deriving title from them by descent or purchase, are also the parties who are entitled to locate under the 2d section of that act. I found this opinion on the language employed and the provisions made in the different sections; the whole of which, when taken together, seem to me to admit of no other interpretation. Nothing is said of the original grantee: the successful claimant before the commissioners is treated as a party entitled; and so far as the present proceedings are concerned, I conceive that he is to be considered the confirmee, and, consequently, a new source of title. This view is sustained by the decision of the Supreme Court of the United States in the recent case of *Strother vs. Lucas*, (12 Peters, 410.) If this course operates injuriously to third persons, I am not certain that a court of equity may not, in some cases at least, give relief by treating the confirmee as a trustee for such persons; and even if it were certain that redress can in no way be obtained, this would not authorize us to depart from the rule which Congress has thought proper to prescribe.

In respect to the points embraced in the remaining questions, I am of opinion—1st, that a patent is unnecessary to complete the title of the confirmee, as against the United States, for those portions of the land not interfered with by the sales or locations described in the 2d section, and that there is no

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authority for issuing such patents. In some other cases now before me, it seems to have been assumed by the General Land Office that, under the act of 1836, as well as under the act of 1824, patents were to be issued in all cases. The same thing is taken for granted in the papers from the General Land Office in the present case; and I do not know that the commissioners designed to ask that my opinion should be taken on the point; but as it is embraced in the general terms of the above fourth question, I have examined it with care.

The third section of the act of 1836 expressly provides that patents shall be issued for the new locations made under the 2d section; and these are the only patents it directs to be issued. Nor is there any such direction in the act of 1833, or 1832, referred to in the first section; nor can I find any general provision in any former law, under which the authority to issue patents in these cases can be claimed. It was held in the case of *Strother vs. Lucas*, above referred to, that a grant might be made by law, as well as by a patent pursuant to a law; and that a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*. I think this principle is applicable in the present case; and although there may be reasons of convenience in favor of issuing a patent in these cases, yet those reasons can only be addressed to Congress. The law is to be taken as it stands; and in the present form it does not, in my judgment, authorize the issuing of a patent, except in the case specially provided for.

2. I concur in opinion with the Commissioner of the General Land Office, that the "location" spoken of in the proviso to the 2d section, and the "locations" mentioned in the 3d section, may well be considered as referring to the act of entering the lands, and not to the lands as located; and, consequently, that the party may be allowed to locate on separate tracts, conforming to legal divisions and subdivisions, at one time, and within one and the same district. This construction, though liberal, seems to me warranted by the words, the context, and the subject matter; but, in view of the difficulties stated by the Commissioner and the Solicitor, it certainly can-

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not be so extended as to authorize locations in different districts.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

CONFIRMATIONS AND PATENTS OF LANDS IN MISSOURI.

A New Madrid location of lands upon a tract confirmed to the heirs of James Mackay, must yield to the title of the confirmees, as the "sale or other disposition" referred to in the 11th section of the act of May 26, 1824, is to be understood to mean a sale or disposal in conformity to law.

Ordinary sales of lands afterwards confirmed to a Spanish claimant, must yield to the confirmed claim.

ATTORNEY GENERAL'S OFFICE,

August 8, 1838.

SIR: In the communication of the Commissioner of the General Land Office of the 21st of January last, referred to this office for my opinion, several cases are stated, which I proceed to consider.

1. By a decree of the Supreme Court of the United States, rendered in January term, 1836, the claim of the heirs of James Mackay to a tract of 800 arpens was duly confirmed. On a survey, it is found to include 601.76 acres surveyed and patented under a location certificate made in 1817 to one La Fleur, pursuant to the act of February 17, 1815, for the relief of the New Madrid sufferers; and also 78.80 acres of another survey, made under a location certificate granted in 1817, in the name of one Shaver, under the same law, but not yet patented. In this state of things, the Commissioner inquires whether the New Madrid locations are to be considered illegal, and a patent to be issued for the Mackay survey?

The first section of the act of February 17, 1815, authorized the sufferers described therein to locate any of the public lands of the Missouri Territory, "the sale of which is authorized by law."

In the construction of this clause, opinions were given in the year 1820, by one of my predecessors, (Mr. Wirt,) and adopted by the then Secretary of the Treasury, that locations

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made before the survey of the public lands were utterly void, and that patents could not issue on them. In this opinion (in the case of Mr. Bates, dated October 10, 1825,) Mr. Wirt lays it down, that in order to ascertain what lands were in 1815 authorized to be sold, we must look to the act of the 3d of March, 1811, providing for the final adjustment of land claims in the Territories of Louisiana and Orleans. The proviso of the 10th section of that act interdicted the sale of any tract of land, the claim to which had been duly presented to the recorder for investigation by the commissioners, till after the decision of Congress thereon. This proviso was rendered permanent by the third section of the act of February 17, 1818; and by the act of 26th of May, 1824, claimants to lands within the State of Missouri and Territory of Arkansas were authorized to institute judicial proceedings to try the validity of their claims. During the pendency of a claim which had been submitted to the district court of Missouri under the act of 1824, Mr. Wirt held, in the case of Bates, that locations on lands thus claimed were irregular; and that the certificates thereof having improvidently issued, patents ought not to be granted until the final decision should be had on the claim by the judiciary. In a subsequent opinion, dated October 22, 1828, he held that a sale of land excepted from sale by these acts was void for want of authority, and that the issuing of a patent would not cure its invalidity.

'The only doubt I have felt as to the soundness of these principles, and of the conclusion to which they lead, when applied to the present case, arises from the provision in the eleventh section of the act of May 26, 1824—"that if in any case it should so happen that the lands decreed to any claimant shall have been *sold* by the United States, or *otherwise disposed of*, the party interested shall be compensated, by being allowed to enter a like quantity in any land office in the State of Missouri," &c. It appears to me, however, that the sale, or other disposition here referred to, is one that has been lawfully made, in the manner and by the officers prescribed by law; and that the heirs of Mackay, in the present case, are entitled to a patent for the full amount of their claim.

2. In the case of *Mordecai Bell*, whose claim to 350 arpens

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is confirmed by the act of July 4, 1836, I am of opinion that the tract of 6.28 acres included in the survey, and previously confirmed by the old board of commissioners, must be regarded as clearly held by a prior title; but that Bell's claim will be valid for the residue, notwithstanding the survey includes two tracts located, and another located and patented, under the New Madrid law. These cases must stand on the same ground as those noticed in the case of Mackay's heirs, because the lands embraced in the act of 1836 were equally reserved from sale.

3. In the case of *Peter Chouteau*, (whose claim is also confirmed by the act of July 4, 1836, but the survey of which is found to be comprehended within the limits of the tract claimed by the inhabitants of the town of St. Charles, under the acts of 10th June, 1812, the 26th May, 1824, and the 27th February, 1831,) I think it probable that his claim will be found to be superior to that of the inhabitants of St. Charles; but, as the original title on which the latter rely is not before me, I am not able to express a decided opinion on this point.

4. In answer to the fourth question proposed by the Commissioner, I have the honor to state, that the mere fact that a sale had been made by the officers of the United States prior to the act of July 4, 1836, of lands covered by claims confirmed by that act, will not of itself be sufficient to exclude the land sold from the survey for the confirmed claim. The sale must have been made by authority of law, as above explained in the case of Mackay's heirs, before it can with propriety be excepted.

5. In respect to the several cases arising under the act of July 4, 1836, I refer to my opinion of the 6th instant, for the grounds on which I have come to the conclusion that patents are not to be issued under that act, except for the new locations made under the 2d section of the act.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

Compensation of Secretary &c., in Exploring Expedition.

COMPENSATION OF SECRETARY TO COMMANDER OF EXPLORING EXPEDITION.

The secretary of the commander of the surveying and exploring expedition has no legal right to compensation for services rendered anterior to the appointment of the commander and the receipt of formal notice of his appointment as secretary; yet if he actually rendered services in respect to that expedition before, and in the judgment of the President has an equitable claim, he may be paid out of the appropriation of 1836, for the expedition, without sending the claim to Congress.

ATTORNEY GENERAL'S OFFICE,

August 13, 1838.

SIR: I have the honor to acknowledge the receipt of your letter of the 3d ultimo, transmitting the report of the late Secretary of the Navy, on the memorial of John N. Reynolds, claiming compensation for services connected with the surveying and exploring expedition, alleged to have been rendered by him between the 9th of July, 1836, and the 16th of November in that year; and to inform you that I have examined those documents, and duly considered the question proposed to me, by direction of the President, as to the *legal* right of Mr. Reynolds to the pay charged in his account.

It is obvious that no person can be said to have a *legal* claim to compensation for services rendered the United States, except where he has been duly appointed to some office, or duly employed in some duty, recognised by law. Services voluntarily rendered, however valuable, and however strongly they may appeal to the liberality and equity of the government, cannot be said to give the party who renders them a legal right to compensation.

In the case of Mr. Reynolds, the only appointment which (as appears from the documents) was *actually* conferred on him, was that of corresponding secretary to the *commander* of the surveying and exploring expedition. A question is made whether this appointment took effect from the 11th of July, 1836, when a memorandum stating it was made by the President, and delivered to the Secretary of the Navy; or from the 16th of November, 1836, when a formal notice thereof was sent to Mr. Reynolds by the Secretary. But even if the first of these dates be adopted as the time when the *appointment*

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commenced, still there can be no *legal* claim to compensation until the *duties* of the appointment legally commenced; and, from the very nature of the case, that could not be until *after the appointment of a commander*. According to the report of the Secretary, the commander was not actually appointed until about the 16th of November, 1836; and I am therefore of opinion that there exists no legal claim to compensation as secretary to that commander, for any services rendered prior to that date.

It would seem, however, that Mr. Reynolds rests his claim to compensation for the period between the 9th of July, 1836, and the 16th of November, 1836, on the fact that his time was exclusively devoted to matters connected with the expedition; and, in a letter to the Secretary of the Navy, dated March 30, 1837, he says he is prepared, if it be the wish of the department, to make out a report of the duties he has performed. The Secretary, in his report, does not distinctly respond to this allegation; and if the fact be as alleged, the question will still recur, whether the services were rendered in pursuance of a legal appointment; for, if not so rendered, there will be no *legal* right, as already stated, to compensation.

In regard to equitable claims for services rendered the exploring expedition, I think it proper to add, that, as the application and expenditure of the sum appropriated by the act of 1836 were referred to the discretion of the President, there is no doubt he may direct the payment of any claim for services actually rendered in this matter, to which he may deem the party equitably entitled, without turning him over to an application to Congress.

I am, sir, &c , &c.,

B. F. BUTLER.

To the SECRETARY OF THE NAVY

EXTENSION OF THE LAKE ERIE AND WABASH CANAL.

The proposed extension of the canal from Lake Erie to the Wabash, from the mouth of the Tippecanoe to Terre Haute, is authorized by the act of Congress, and when the same shall have been agreed on and located, the additional lands provided by the act, so far as the United States are in a condition to provide them, may be legally claimed by the State of Indiana.

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But selections of land beyond the limits of five sections in width on each side of the extended portion of the canal, in lieu of land which has been sold or otherwise disposed of, cannot be made without the assent of Congress.

ATTORNEY GENERAL'S OFFICE,
August 14, 1838.

SIR: Pursuant to the request contained in your letter of the 30th ultimo, I have examined the communication addressed to you by the Commissioner of the General Land Office, and the numerous documents accompanying the same, in relation to the claim made by the State of Indiana to additional lands, under the act of the 2d of March, 1827, "to grant a certain quantity of land to the State of Indiana, for the purpose of aiding said State in opening a canal to connect the waters of the Wabash river with those of Lake Erie." The legislative provisions, and other matters applicable to the case, are so fully stated in the communication of the Commissioner, that, without repeating them, I shall proceed to state my opinion on the three following questions proposed by him:

1. Was the State estopped or precluded from extending the canal from the mouth of Tippecanoe river to the Wabash, at Terre Haute, so as to be entitled to the additional quantity of land asked for under the act of 2d of March, 1827?

2. If such right existed, can the "Commissioner, under the direction of the President of the United States," make an additional selection from public lands, beyond the limits of five sections in width, on each side of the extended portion of the canal, in lieu of land which has been sold or otherwise disposed of within these limits, and which would otherwise belong to the State?

3. Has the State, by the governor or other authorized agent, a right to make this selection, in the first instance, and report such selection to the Secretary of the Treasury, or other officer, for subsequent recognition?

The first of the above questions must, in my opinion, be answered in the *negative*.

In the communications made to the General Land Office, in behalf of the State of Indiana, reliance is placed on the fact, that, although the legislature of Indiana adopted, by their act of the 23d of January, 1829, the survey of Colonel Moore, the

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United States engineer, which terminates at the mouth of Tippecanoe river; yet this was only done, according to the words of the law, "*for the time being.*" This reservation, it is agreed, preserved to the State the right to extend the route of the canal to any other point on the Wabash lower than the Tippecanoe, should it be deemed advisable. There is certainly much force in this suggestion; but I do not rest my opinion on this ground, because I cannot think that this qualification was inserted in the act of 1829 with any design of reserving the right to vary the western termination in the manner now proposed. It appears to me that it was inserted with the view of providing for such occasional variations from the line traced by Colonel Moore, as might be found necessary in the execution of the work, without departing therefrom to any such extent as to render the allotment of the lands to be received from the United States (and which lands were to be immediately designated) inapplicable thereto. A material departure from the line, and an extension of the canal to a distant point on the Wabash, would be inconsistent with the idea. It is evident, from the correspondence between the executive authorities of the State and those of the federal government, and from the acts of those functionaries, that they all supposed that the western termination of the canal was to be at or near the mouth of the Tippecanoe; and I think it scarcely to be doubted that the legislature of the State actually intended that it should so terminate; and the qualification above quoted had no reference to any probable alteration of the termination, except such as might be found expedient, within the ten miles. It would, therefore, in my judgment, be against the probable intent of the legislature, and the understanding of the public authorities on both sides, to construe the reservation as including the present case.

I think, however, that the proposed extension of the canal from the mouth of the Tippecanoe (the first termination on the Wabash) to Terre Haute, as now proposed, is a measure fully authorized by the act of Congress of the 2d of March, 1827, provided it be admitted (as is doubtless the fact) that such an extension is necessary to the completion of a convenient and useful navigation between the waters of the Wabash and those

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of the lake. In construing this law, we are to have special regard to the purposes intended to be accomplished by it. They were evidently to encourage the State of Indiana to construct a canal between the navigable waters of the Wabash and the lake, it being supposed by the law makers that such a navigable communication would promote the interests of the United States, as well as those of the State, by enhancing the value of the public lands in its vicinity, and by furnishing increased facilities for the transportation of the troops and property of the United States from place to place in the region through which it passed. Hence the engagement to the State of a certain quantity of lands along the route of the canal; and hence, also, the stipulation that the United States should have a perpetual right of way over the canal for the transportation of their property and of persons in their service. In reference to such a law, it appears to me to be too narrow a construction of it to hold that the State is concluded, as to its point of termination on the Wabash, by the selection made in 1829. The great object of the law was to promote the opening of a communication from the lake to the *navigable* waters of the Wabash; nothing short of this will effectuate the intent of its authors, or secure to the United States the benefits intended to be derived from it. If, therefore, it is found by further investigation, that to secure a convenient and useful means of communication between the navigable waters of the river and those of the lake, the canal should be extended to Terre Haute, then I think it not only competent for the State of Indiana, within the true meaning of the act of Congress, but due on the part of that State to the United States, that such an extension should be made.

If it be said that the United States are satisfied with the communication already opened, and that the construction above given makes the State the sole judge of the question whether the extension is really necessary or not,—my answer is, that the power and duty of fixing the terminating point were left, by the act of 1827, exclusively to the State legislature; that the fact that the greater part of the expense of constructing the canal will fall upon the State, is a sufficient guaranty that the extension of the canal to a lower terminating point will not be

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resolved on, unless it be really deemed necessary to the usefulness of the work; and that, if it be long delayed, the public lands along the route of the proposed extension may all be sold; and if so, according to a subsequent part of this opinion, the State will be obliged to apply to Congress for relief, who will have full power to deny it altogether, or to grant it on such conditions as they may deem just. In respect to time, it is also to be observed that no extension can be made, within the law of 1827, however necessary it may be to the perfection of the work, unless it be fully completed within twenty years from the date of that law; it being expressly provided that the canal shall be commenced within five, and finished within twenty, years from that time.

The provision just referred to is the only limitation as to time contained in the law; and as the work was actually commenced within the five years, and as the twenty years have not yet expired, I am of opinion that the proposed extension of the canal from the mouth of Tippecanoe to Terre Haute, if completed within the twenty years, must be regarded as a part of the canal contemplated by the act of 1827; and that when the same is located and agreed on by the legislature of the State, the additional lands provided by the act, so far as the United States are now in a condition to provide them, may be legally claimed by the State. I perceive no just ground for distinguishing this claim from that made by the State of Ohio in respect to the eastern termination, and allowed by the United States.

2. The second of the above questions must, in my opinion, be answered in the *negative*. The arguments offered in behalf of the State have failed to convince me that there is any power in the executive department to remedy the deficiency referred to in the question. In all analogous cases which have heretofore occurred, (and one of them was under this law,) it has been thought necessary to apply to Congress. Independent of the legislative construction which has been given to the law, I should have deemed it unsafe and improper to claim the power supposed; after that construction, it seems to me to be wholly inadmissible.

3. The third question must also, in my judgment, be answered in the *negative*.

Right of Assistant to Pay of Assistant and Surgeon General.

It may be conceded that the duty imposed on the Commissioner of the General Land Office, of selecting, under the direction of the President, is confined, on a strict construction of the first section, to the alternate sections to be secured for the United States; but that selection is to be made in the first instance, and, when made, it necessarily designates the sections to be taken by the State. The authority conferred by the second section on the governor or other agents of the State, is not an authority to *select*, but to *examine* and *ascertain* the particular lands to which the State will be entitled; and if it includes the power to *select*, it must be exercised in subordination to that previously given to the Commissioner of the General Land Office.

In reference to this question, and indeed to all the questions proposed to me, it is proper to remark, that they have all received a practical construction, not only as arising under the act of 1827, but under laws of a similar nature which are referred to in the correspondence before me; and that where this is the case, the course usually adopted by the department ought not to be departed from, unless clearly found to be erroneous.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF THE TREASURY.

RIGHT OF ASSISTANT TO PAY OF ASSISTANT AND SURGEON GENERAL.

An assistant surgeon appointed Surgeon General *ad interim*, and discharging at the same time the duties of both offices, is entitled to the pay of both, unless the functions of the former were merged in the latter or suspended by the performance of such other duties as to make it legally improper or actually impossible for him to execute the functions of assistant.

ATTORNEY GENERAL'S OFFICE,

August 16, 1838.

SIR: I have considered the claim of Assistant Surgeon King, of the army, as stated in the papers enclosed to me in your communication of the 10th of April last, and proceed to state my opinion thereon.

Right of Assistant to Pay of Assistant and Surgeon General.

It appears that Dr. King was appointed Surgeon General *ad interim*, in consequence of a vacancy in the office occasioned by the death of Surgeon General Lovell, and that he held the office and performed the duties until the appointment of Surgeon General Lawson; and for this period he has been allowed the pay and emoluments of Surgeon General. He also claims the pay and emoluments of his original appointment of assistant surgeon, for the same period; on the ground that, whilst acting as Surgeon General, he was also obliged to perform, and did perform, the duties of assistant surgeon in due course. This latter claim having been paid by Paymaster Randall, the account has been disallowed in the settlement of that officer's accounts; and the question for my opinion is, whether it can legally be allowed?

As Dr. King holds the commission of assistant surgeon, and did so during the period referred to, he is *prima facie* entitled to the pay and emoluments of the office; and if, according to military law and usage, it is compatible with the rank and duties of Surgeon General for a person holding that office *ad interim* to perform the duties of assistant surgeon, and Dr. King did actually perform them, he will then, in my judgment, be not only legally, but equitably, entitled to the pay and emoluments of assistant surgeon. The fact that he performed the duties and received the pay of another office will not deprive him of his legal and equitable title to the pay of his permanent office, unless the functions of the latter were merged in, or suspended by, the performance of such other duties, so as to make it legally improper or actually impossible for him to execute those functions. These principles were stated by me in the case of Major Cross, in my opinion of the 11th of July, 1836, and have frequently been adopted in the practical administration of the government.

There is an official connexion between an assistant surgeon and the Surgeon General, both officers belonging to the medical staff of the army, and the latter being the head of that staff. Dr. King's right to the pay of the two offices is, therefore, less clear than the right was in the case of Mr. Taney, to which he refers; because there was no connexion whatever between the office of Attorney General and that of Secretary of War, the

Rights of the Choctaws under Treaty of 1830.

two offices held by Mr. Taney. Still, if it was consistent with military law and usage for Dr. King to perform the duties of assistant surgeon whilst acting as head of the medical staff, and if he did perform them, the same principle will apply. As this case depends on a point of military law and usage; it will scarcely be expected that I should do more than lay down the rule by which it should be decided.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

RIGHTS OF THE CHOCTAWS UNDER TREATY OF 1830.

The residence of heads of Choctaw families who in due time signified to the agent their intention to remain and become citizens of the United States, or a valid excuse for non-residence, entitles them to grants pursuant to the treaty; and such grants when made are paramount to pre-emption and all other claims.

The War Department, however, should endeavor to avoid interference with the rights of settlers whenever it can be done consistently with the provisions of the treaty.

ATTORNEY GENERAL'S OFFICE,

August 17, 1838.

SIR: Pursuant to the request contained in your letter of the 11th of June last, I have looked into the case of Jubal B. Hancock *vs.* James Parker and others, as exhibited in the various documents transmitted with your communication.

I find that the parties are at issue in respect to several questions of fact, concerning which a great mass of testimony has been taken by the respective parties, and which have been elaborately discussed by their counsel. But, as the Attorney General has no authority to decide questions of fact, or to express any opinion thereon; and as no statement of the facts supposed by the department to be established by the evidence has been laid before me, I can only state some general considerations which have occurred to me, leaving it to the department to apply them to the facts of the case, if it shall think them applicable.

Assuming that Hancock was a Choctaw head of a family,

Rights of the Choctaws under Treaty of 1830.

within the meaning of the treaty of 1830; that he signified his intention to remain and become a citizen of the United States, to the agent, in due time; and that he resided upon some part of the lands claimed by him, as required by the treaty, or was prevented from so residing by circumstances beyond his control, and involving no fault on his part;—and then it will follow that a grant should be issued to him pursuant to the treaty. The essential provisions of the treaty are paramount to any rights claimed under the pre-emption laws, or in any other way, and must be substantially carried into effect. The regulations adopted for the purpose of carrying the treaty into effect have not, however, any such inflexible character; and though very proper that they should be generally adhered to, may be modified in any way, not inconsistent with the treaty, which justice may require. Cases of interfering claims, occurring under the treaty itself, may frequently require such a modification; and where persons have made settlements and valuable improvements, with the expectation of acquiring titles under the pre-emption laws, and without having actual notice that a claimant under the treaty was entitled to the land so improved, or notice of such circumstances as were sufficient to put such settler on inquiry, I think they should be regarded as having equitable claims on the justice of the department; and that, in the exercise of a sound discretion, the reservation of the Indian claimant should, so far as the treaty will permit, be located in such a way as, if possible, to save to the settler the benefit of his improvements. The only points connected with the subject which are inflexibly fixed by the treaty, and which cannot be varied to protect actual settlers, are, that the reservation shall be bounded by sectional lines of survey, and shall include the improvement of the reservee, or some portion of it. So that these conditions are complied with, I think the department, where improvements have been made without notice, and under such circumstances as would otherwise entitle the party to purchase under a pre-emption law, should endeavor so to locate the reservation as not necessarily to interfere with the improvements of the settler.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

Duties of Attorney General—Claims under Cherokee Treaty.

PENSIONS TO WIDOWS.

Widows who are on the pension roll and receiving pensions under the 3d section of the act of the 4th of July, 1836, are not entitled to pensions under the act of July 7, 1838.

ATTORNEY GENERAL'S OFFICE,

August 24, 1838.

SIR: In answer to the question arising in the case of Mary Neale, as stated in the communication of the Commissioner of Pensions, referred to me by your letter of the 14th instant, I have the honor to state that, in my opinion, those widows who have obtained and are now receiving pensions under the 3d section of the act of the 4th of July, 1836, are not within the equity or design of the recent act of July 7, 1838. We must look at this last act as a part of the general system of revolutionary pensions; and, so regarding it, there can be no room to doubt that the intent of Congress was to provide for a class of widows not embraced in the prior laws, and not to give to widows already on the pension-list an additional pension. It is true there is no section or clause expressly excluding such persons from the benefit of the law; but I think they are excluded by its obvious intent. I adopt this conclusion with the less hesitation, because, should I have mistaken the real design of Congress in this respect, my error may readily be corrected by a supplementary law.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

DUTIES OF ATTORNEY GENERAL—CLAIMS UNDER CHEROKEE TREATY.

The Attorney General having no power to give an official opinion at the request of the head of a department, except on matters that concern the official powers and duties thereof, all opinions given by him in respect to claims under the Cherokee treaty have been extra-official and unauthorized.

Claims under that treaty were to be examined and adjudicated by commissioners to be appointed by the President, by and with the advice and consent of the Senate, and their decisions were to be conclusive.

Duties of Attorney General—Claims under Cherokee Treaty.

The Attorney General will, however, advise that, whatever may have been the literal construction of the treaty of 1817 in regard to the rights of reserves, provided for therein, to locate their lands without the limits of the cession then made, that right, after the subsequent acts of the parties in the execution of the treaty, and for the purposes of the late treaty, must be conceded to exist.

ATTORNEY GENERAL'S OFFICE,

August 27, 1838.

SIR: I have the honor to acknowledge the receipt of your several communications of the 1st, 20th, and 27th of June last, and the 14th of August instant, each enclosing communications from the Commissioner of Indian Affairs, relative to questions arising under the late treaty with the Cherokees, and now pending before the commissioners appointed to settle claims under that treaty.

The points referred to in these communications have, most of them, been examined by me in opinions heretofore transmitted to your department. It appears, however, from the extracts from the letter of the commissioners enclosed in your letter of the 14th instant, that my opinion of the 26th of May last is unsatisfactory to the commissioners, and that they desire a reconsideration of it. In respect to that opinion, as well as to the former communications from this office on the general subject, I will observe, that I am by no means surprised that they do not in all respects meet the views of others more familiar than I am with the probable intent of the makers of the treaties referred to, and with the practical construction which has been given to those instruments; nor that incongruities should be detected in the views presented in those opinions, on the various points discussed therein. From the great obscurity of the treaty provisions, and my want of accurate knowledge on many parts of the subject, I have found it exceedingly difficult (and in some cases almost impossible) to satisfy myself on the questions referred to me; and it was, therefore, not to be expected that I should be able, in every instance, to satisfy others.

I will also observe, that the treaty provides that the claims arising under the treaty shall be *examined and adjudicated* by commissioners to be appointed by the President, by and with the advice and consent of the Senate, and that their decision shall be *final*. I am satisfied that all the opinions given in this

Duties of Attorney General—Claims under Cherokee Treaty.

office in respect to the claims have been extra-official and unauthorized; the Attorney General having no power to give an official opinion, on the request of the head of a department, except on matters that concern the official powers and duties of such department. The character of the Cherokee board of commissioners is, in principle, the same with that of the boards appointed under the conventions with Spain, Naples, and France; and it was never supposed, in either of those cases, that the Attorney General could be called on, through the head of any department, to examine and discuss the various claims litigated before them. Commissioners or agents are sometimes appointed by the War Department, in the transaction of its concerns with Indians tribes, who stand in such a relation to the department as to be authorized to call on it for advice and assistance; and in these cases the department may call for the advice of the Attorney General on questions of law. When the application of the Cherokee commissioners was first sent from your department, it did not occur to me that they did not stand in this latter relation; and I therefore, from time to time, investigated such questions as were presented, in the hope that my views might render them some aid in the execution of their important and difficult task. Even had the questions been properly referrible to this office, the opinions given here would only have been advisory, and would not have bound the department, or the commissioners, on a point in which they might have been deemed erroneous. As it is, it will be the duty of the commissioners to regard them as given inadvertently, and to give them no other consideration than they would attach to the arguments or opinions of any other disinterested person.

Pursuant to the requests contained in your letters, I have bestowed considerable reflection on the points presented by the commissioners, and discussed in the arguments of Mr. Gillespie; but, after coming to the conclusion above stated, in respect to the want of power in the office to advise on these subjects, it would be manifestly improper to enter into any further discussion thereon. But it should be stated that, from the explanations made by the commissioners, and contained in the other papers before me, I am inclined to think that, whatever

Power of President to cause Surrender of Slaves, &c.

may have been the literal construction of the treaty of 1817, in regard to the right of the reservees provided for therein to locate their lands *without* the limits of the cession then made, that right, after the subsequent acts of the parties in the execution of the treaty, and for the purposes of the late treaty, must be conceded to exist.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

POWER OF PRESIDENT TO CAUSE SURRENDER OF SLAVES IN
REFUGE WITH INDIANS.

The President has no power to cause fugitive slaves, who have taken refuge among the Indians west of the Mississippi, to be apprehended and delivered by the United States officers and agents to the owners from whom such slaves shall have fled.

Even where slaves shall have taken refuge in the States, the President has no authority to cause a surrender except when previously directed or empowered by a law.

Congress has been silent hitherto upon the subject of fugitives among Indians; and although it have the power to make regulations not inconsistent with subsisting treaty stipulations, until it shall have enacted a law in that respect, the President has no authority to interpose.

ATTORNEY GENERAL'S OFFICE,

August 30, 1838.

SIR: Pursuant to the request contained in your letter of the 14th instant, I have considered the question stated in the communication of the Commissioner of Indian Affairs, as to the authority of the Executive, under the third clause of the second section of the fourth article of the constitution, to cause fugitive slaves, who have taken refuge among the Indians west of the Mississippi, to be apprehended and delivered, by the United States officers and agents, to the owners from whom such slaves have fled.

The clause referred to provides that "no person held to service or labor in *one State*, under the laws thereof, escaping into *another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor

Power of President to cause Surrender of Slaves, &c.

may be due;" and was evidently intended to refer exclusively to those portions of the Union which are duly organized as separate States. It is also to be observed that, in respect to the States, it gives no authority whatever to the Executive; who, therefore, cannot interfere in its execution, except when previously directed or empowered by law.

The territory west of the Mississippi assigned to the Indian tribes, not being in the condition contemplated by the clause referred to, is not included within its terms. But as Congress have the general power of legislation over the Indian country, in points not inconsistent with treaty stipulations, as well as over the other territories of the United States, and are, moreover, expressly empowered to regulate commerce with the Indian tribes, they may undoubtedly make such legislative provisions in regard to fugitive slaves who take refuge in the Indian country as they may deem necessary to carry into effect the spirit and design of this part of the constitution. The present laws in relation to the Indian country being (as I have already had occasion to state in the case of Mr. Belton, referred to by the Commissioner) silent on this point, I am of opinion that the Executive has no authority to interpose.

I am, sir, &c., &c.,

B. F. BUTLER.

To the SECRETARY OF WAR.

OPINIONS

OF

HON. FELIX GRUNDY, OF TENNESSEE:

APPOINTED SEPTEMBER 1, 1838.

PENSIONS FOR WOUNDS RECEIVED IN THE NAVAL SERVICE.

The act of 23d April, 1800, does not authorize pensions for wounds received in the line of duty prior to the passage of the act; nor can the act of 3d March, 1837, be construed to embrace such cases.

The only object of the second section of the last mentioned act was to make the pensions more ample in behalf of those entitled under pre-existing laws.

ATTORNEY GENERAL'S OFFICE,

September 3, 1838.

SIR: You state in your letter of the 31st of August last, that Commodore David Porter claims a pension for wounds received in the line of his duty in the naval service prior to the 23d of April, 1800, (the date of the law which established the navy pension fund;) and my opinion is requested whether your department has authority to grant pensions for deaths or disabilities which occurred before the pension fund was established.

My opinion is, that no such authority exists. Upon an examination of the act of 23d April, 1800, no expression is found indicating an intention on the part of Congress that the fund then provided should be subject to cases which had occurred before that time. The second section of the act the 3d of March, 1837, it is believed, cannot be so construed as to embrace a class of persons not included in former laws. The only object of that section is to make the pensions more ample in behalf of those entitled under pre-existing laws.

Yours, very respectfully,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

Duties on Millinery, Hosiery, and Ready-made Clothing.

DUTIES ON MILLINERY, HOSIERY, AND READY-MADE CLOTHING.

The act of 2d March, 1833, to modify the act of July 14, 1832, and other acts admitting silks, did not repeal the act of 14th July, 1832, and former acts, which impose duties on millinery, hosiery, and ready-made clothing; and those articles, of whatever material composed, are subject to duties.

The operation of the revenue laws cannot be legally suspended by the Comptroller, even though goods may have been ordered in view of an erroneous practice, and the importers wish to countermand their orders from abroad.

ATTORNEY GENERAL'S OFFICE,
September 8, 1838.

SIR: I have examined the two questions submitted for my opinion in your letter of the 4th instant. The first is, "Has the act of the 2d of March, 1833, entitled 'An act to modify the act of July 14, 1832, and all former acts, by declaring that manufactures of silk, or of which silk shall be the component material of chief value, coming from this side the Cape of Good Hope, except sewing silk, shall be admitted to entry free of duty,' repealed in effect those portions of the act of the 14th of July, 1832, and of former acts, in which certain duties are imposed upon millinery, hosiery, and ready-made clothing, without reference to material, when such articles are composed wholly or in part of silk?"

In deciding upon this question, it should be remembered that, prior to the passage of the act of the 14th of July, 1832, Congress had imposed certain duties on articles of millinery, hosiery, and ready-made clothing, at a higher rate than those specified in the fifteenth clause of the second section of that act; and the language of the fifteenth clause of the second section of the act of 1832 is as broad and comprehensive (so far as this question is concerned) as that of the fourth section of the act of 1833—the first reducing the duty to five per centum *ad valorem* upon the articles referred to in your inquiry, and the latter act repealing the duty altogether. Yet, under the act of 1832, the higher duties were collected upon millinery, hosiery, and ready-made clothing; nor have I learned that any serious question was ever raised upon the subject. Since the

Duties on Millinery, Hosiery, and Ready-made Clothing.

passage of the act of 1833, the same practice has prevailed, with slight variations, arising from the difficulty of classifying particular articles. The construction thus placed upon these acts immediately after their passage, and the acquiescence of the parties interested, and of Congress, furnish strong evidence that the construction was correct. Upon a view of all the acts upon this subject, and giving to them a reasonable interpretation, so as to carry into effect and not defeat the intention of the legislature, I have come to the conclusion that millinery, hosiery, and ready-made clothing, of whatever materials composed, are subject to duties; and that the laws imposing them prior to the act of the 2d of March, 1833, are not repealed by that act.

To illustrate my opinion practically, I would say, that where the mercantile community have given a name, appellation, or description, to any article or articles of merchandise, and by that name, appellation, or description, Congress has imposed a certain duty on them, the duty is to be collected; and that, in all other cases, manufactures of silk, or of which silk shall be the component material of chief value, coming from this side the Cape of Good Hope, shall be free of duty, except sewing silk, which is subject to a duty of forty per centum *ad valorem*. By pursuing this course, it seems to me the Comptroller, in performing his duties of commissioner of the revenue, will act agreeably to the spirit of the various laws on this subject, and in accordance with the course hitherto pursued under them, and will avoid the dangerous practice of repealing laws by constructive implication.

Your second question is, "Can the Comptroller, in giving a construction to the revenue laws, which, from former erroneous practice, may prove injurious to the commercial community if immediately acted on, legally suspend their operation, as construed by him, with the view of allowing the importers of the goods time to countermand their orders for goods from abroad?"

My answer to this question is decidedly in the negative. The duty of the Comptroller is to execute the revenue laws. Neither he, nor any other officer of the government, has the

Pensions to Widows of Revolutionary Soldiers.

power to suspend the operation of an act of Congress, unless specially authorized to do so by the act itself, or some other law.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

P. S.—Since the foregoing opinion was given, the Supreme Court has decided that silk stockings and half-stockings, coming from this side the Cape of Good Hope, are free of duty.

PENSIONS TO WIDOWS OF REVOLUTIONARY SOLDIERS.

Widows of revolutionary soldiers whose first marriage took place after the expiration of the last period of their service, and before January 1, 1794, who remarried anterior to the passage of the act of July 7, 1838, are not entitled to pensions.

ATTORNEY GENERAL'S OFFICE,

September 18, 1838.

SIR: In your letter of the 17th instant, you propose the following question for my opinion: "Is a widow, whose husband served six months during the revolutionary war, and who was married to him prior to the year 1794, excluded from the provisions of the act of the 7th of July, 1838, in consequence of having married after the death of her husband, on account of whose service she claims?"

The first section of the act of the 7th of July, 1838, is as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any person who served in the war of the Revolution, in the manner specified in the act passed the seventh day of June, eighteen hundred and thirty two, entitled 'An act supplementary to the act for the relief of certain surviving officers and soldiers of the Revolution,' have died, leaving a widow, whose marriage took place after the expiration of the last period of his service, and before the first day of January, seventeen hundred and ninety four, such widow shall be entitled to receive, for and during the term of five years from the fourth day of March, eighteen hundred and thirty-six, the annuity or pension which might have been allowed to her husband in virtue

Breach of Blockade—Capture, Rescue, &c.

of said act, if living at the time it was passed: *Provided*, That, in the event of the marriage of such widow, said annuity or pension shall be discontinued."

It is upon this section, and no other provision of law, that the class of claims embraced in your question is to be allowed or rejected. It cannot be believed that Congress intended to, and did, provide for a discontinuance of a pension already granted, upon the event of the widow's second marriage, and still that such marriage should not prevent the allowance of the pension in the first instance, when the second marriage took place before the pension was granted. I am, therefore, of opinion that the Commissioner of Pensions decided correctly in rejecting this class of claims.

Yours, with much respect,

FELIX GRUNDY.

To the SECRETARY OF WAR.

BREACH OF BLOCKADE—CAPTURE, RESCUE, &c.

Where an American vessel had entered and cleared from a port under blockade, and, whilst returning to New Orleans, was captured by a vessel belonging to the French blockading squadron, from which the captain of the former rescued her and brought her into the port of New Orleans, to which he was destined; and demand, subsequently, being made of the Executive to deliver up the vessel and cargo, both on account of the said breach of blockade and the rescue—**DECIDED**, that the captors have no right of property in said vessel and cargo; and that the liability of the vessel to condemnation, if it ever existed, has ceased by the termination of her voyage at the port of her destination.

The case made by the French government calls for a judicial decision settling certain questions of fact concerning the legality of the blockade, capture, &c., before the Executive can act.

Independently of this, there is no constitutional right vested in the Executive to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, nor legally adjudged to belong to another.

ATTORNEY GENERAL'S OFFICE,

October 11, 1838.

SIR: In the investigation of the different points submitted for my examination respecting the vessel *Lone*, Captain Clarke, and her cargo, I have been able to derive very little assistance,

Breach of Blockade—Capture, Rescue, &c.

upon the important principles involved, from any opinions given by my predecessors. No similar question ever appears to have been submitted to their consideration. The public authorities of another country have never heretofore made an application to this government to deliver up property claimed by, and in the possession of, a citizen of the United States, under circumstances like the present—upon the obligation of its forfeiture for a breach of blockade, and before any condemnation. Nor is any instance known to me in which this government has been called on to interpose, and restore to the captors property that was rescued from them by reason of a failure on their own part to make the capture sure. By the well-settled principles of international law, it is made the duty of the captors to place an adequate force upon the captured vessel; and if, from a mistaken reliance on the sufficiency of their force, or misplaced confidence, they fail to do so, the omission is at their own peril. No instance is known in which it has been regarded as a ground for asking such interposition as is now sought.

To these causes, which may account for the want of any precedent, is to be added the novel nature of the blockade itself. It has been resorted to, not as a warlike, but as a peaceful measure for the reparation of an injury alleged to be committed by one nation upon another. The writers on international law seem not to have enumerated a blockade among the peaceful remedies to which an injured nation may resort, but class it among the usual measures of direct hostility. No principles, therefore, have been laid down by them strictly applicable to the present case, and it can only be treated on those which refer to ordinary blockades in time of war.

These rules, then, must be the guide in giving this subject the respectful consideration that is due; and the rights which belong to the captors of this vessel and cargo, under these rules, form the first point of inquiry.

Captain Clarke had entered the port of Matamoras; he sailed from thence bound to New Orleans, as his port of final destination. On his homeward voyage, he was captured by a vessel belonging to the French blockading squadron. The condition of this squadron at the time he entered the port, whether it was actually present, or so far absent as temporarily to relax

Breach of Blockade—Capture, Rescue, &c.

the blockade, does not appear. Some days after the capture, he rescued his vessel, and, continuing his original voyage, brought her safe into New Orleans, where it terminated. If it were admitted that there was such a violation of the blockade as to justify, according to the law of nations, the original capture; and if further admitted that the rescue of the vessel was, by the same law, an additional and lawful cause of condemnation; still it is a principle equally well established and recognised, that the offence thus incurred never travels on with the vessel further than the end of the return voyage. If captured, or recaptured, in any part of that voyage, she is taken *in delicto*, and liable to be condemned; but if she terminates the entire voyage in safety, that liability has entirely ceased; nor can the captors demand her condemnation, much less her delivery to them.

It is a principle of international law equally well established, that the capture transfers no property in the vessel and cargo to the captors; but the title to it remains unchanged until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction. Upon this principle, the captors in the present instance can claim no more property in the vessel and cargo than they could have done had there been no seizure. Their right of property, whatever it may be, does not vest until the vessel shall be legally condemned; and before that event they cannot ask the delivery of the property.

On these grounds, whatever may be thought of the conduct of Captain Clarke, in entering the port of Matamoras, and subsequently rescuing his vessel, it is clear that, by the well settled principles of international law, the captors, who now claim the vessel and cargo, have no right of property in her; and that her liability to condemnation, if it ever existed, has ceased by the termination of her voyage at the port of her destination.

The next point of inquiry suggested by this application is the authority of the Executive to direct the delivery of the vessel and cargo. Without discussing the relative functions and powers of the different departments of the government, it is sufficient to observe, that the case, as presented by the French government, calls for a decision not executive, but judicial. It involves necessarily these questions: Was the blockade es-

Breach of Blockade—Capture, Rescue, &c.

established and maintained according to the law of nations? Was the capture a lawful one? Was there a rescue, and with what attendant circumstances? And what is the legal effect of the rescue and safe arrival of the vessel at her port of final destination? These are points which it would be necessary to ascertain before the Executive could act. They are points strictly within the cognizance of judicial tribunals; and there are courts in which they may be fully investigated.

But, independent of this consideration, there is no constitutional right vested in the President to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, or legally adjudged to belong to another. Some years since, the jewels of the Princess of Orange, which had been stolen and brought to this country, were seized by the collector of New York, and libelled in that district, and an application for their delivery was made by the government of Holland. My predecessor (Mr. Taney) gave several opinions in the progress of the proceedings. The inference fairly to be deduced from the whole of them is, that where there are different claimants to property, who can litigate their rights before the judiciary, the Executive cannot interfere; but he may order property to be restored to the rightful *undisputed* owner, in a case where the *United States alone*, under their revenue laws, have put in a claim for a forfeiture. I think I am safe in saying that no opinion going farther than this has ever emanated from this office. But were the President to accede to the present application, it would be, in fact, to take the property from the possession of an individual, once admitted to be the rightful owner, still claiming it as such, and never having had his title divested by the judgment of a court, upon the mere allegation of his having violated a blockade. This the President cannot do.

It is, however, satisfactory to know that, notwithstanding these views as to the course of the Executive, there are ample means of redress left to the captors, should they have a legal right to this property; and that, if there has been any injury, the institutions of this country afford that full satisfaction which it is the object of the French government to obtain by its present application. The admiralty courts of the United

Extra Pay of Clerks in the War Department.

States, whose judgments are based upon the established principles of international law, as recognised by all modern and civilized nations, are open to the captors, and will administer justice commensurate with their rights. The only requisites necessary to give them jurisdiction exist in this case; for the parties to be proceeded against, and the property, are now within their power, can be reached by their process, and bound by their decrees.

In declining, therefore, to accede to the present application, on grounds of international law, as well as under his constitutional obligations, the President is not instrumental in interfering with the legal claims of those on whose behalf the government of France has interested itself; but leaves them, as every just government must be disposed to do, the amplest means of asserting those claims, and regaining any rights they may have lost.

I have the honor to be, sir, very respectfully, your obedient servant,

FELIX GRUNDY.

To the PRESIDENT OF THE UNITED STATES.

EXTRA PAY OF CLERKS IN THE WAR DEPARTMENT.

The two clerks in the bureau of Indian Affairs are not entitled to the additional compensation asked for, under the third section of the act of 3d March, 1837.

ATTORNEY GENERAL'S OFFICE,

November 6, 1839.

SIR: Your communication of the 17th of September, enclosing the claim of two of the clerks employed by the Commissioner of Indian Affairs, for additional compensation, has been considered. I am unable to discover any legal foundation whatever for their claim to the benefit of the 3d section of the act of the 3d of March, 1837.

In the first place, it cannot be supposed that Congress intended to embrace in that provision salaries not fixed by themselves, but which had been fixed by the head of a department; and, in the present case, the Secretary of War had fixed

Character of Land Scrip in Satisfaction of Warrants.

the salaries of the present applicants, according to his own judgment and discretion.

In the second place, the case of an allowance of \$2,400 by Congress to clerks performing a particular service, and its being left to the Secretary of the Treasury to apportion it between them, is conceived to be a very different case from the present. In that case, Congress had fixed the compensation of the clerks jointly, and the Secretary only apportioned it.

Therefore these clerks might well be allowed the benefit of the act of 1837, referred to; their compensation having been fixed by Congress, and not coming within the exception contained in said act.

My opinion, therefore, is, that the additional compensation asked for by the applicants cannot lawfully be granted.

I am, sir, very respectfully, your obedient servant,

FELIX GRUNDY.

To the SECRETARY OF WAR.

CHARACTER OF LAND SCRIP IN SATISFACTION OF WARRANTS.

Land scrip issued in satisfaction of military bounty land warrants must be regarded as real estate, and to go upon the death of the holder to the heirs-at-law, and not to the executors and administrators.

ATTORNEY GENERAL'S OFFICE,

November 9, 1838.

SIR: I have the honor to acknowledge the receipt of yours of the 6th instant, enclosing a communication from the Commissioner of the General Land Office, with sundry accompanying documents.

The question submitted for my opinion is, Whether land scrip issued in satisfaction of military bounty land warrants is personal property, and subject to the exclusive control of the executor or administrator; or is real estate, which descends to the heirs-at-law?

Military bounty land warrants have always been considered as real estate, and, of course, land scrip issued to satisfy them should be considered in the same light; for it would not do to say that the warrant belonged to the heirs-at-law, and that the

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scrip, which the government furnished in satisfaction of the warrant, should belong to the personal representatives of the deceased. By this means, the government by its act of payment, or furnishing a new evidence of debt, would be changing the ownership as between individuals. This could not be deemed admissible.

That scrip should be considered as real property, is proved not only by the fact that it is payable in land only, but also by the provisions of the act of May 30, 1830, which provides "that all certificates or scrip to be issued in virtue of any warrant hereafter to be granted, shall be issued to the party originally entitled thereto, or his heir or heirs, devisee or devisees, as the case may be." My opinion therefore is, that land scrip is real, and not personal property.

I cannot consider the opinion of the late Attorney General in the case of Triplett as applicable to the question now under consideration; and if it were, I should feel it my duty to say that I wholly dissented from it.

I therefore advise that the practice which has hitherto prevailed in the Land Office, of considering scrip as real property, and subject to the disposition of the legal heirs and devisees, and not liable to the control of the personal representatives of the deceased, be adhered to.

I am, sir, very respectfully, your obedient servant,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

THE SMITHSONIAN LEGACY TO THE UNITED STATES.

The entire legacy bequeathed to the United States by James Smithson, for the purpose of founding an establishment in the city of Washington for the increase and diffusion of knowledge, should be kept entire for effectuating the purposes of the testator.

The expenses of prosecuting for the said legacy, and of receiving and transporting it to this country, including additional expenses incurred, therefore, ought to be defrayed out of the appropriation made by Congress.

The personal effects other than cash and stocks, which have been transferred to the United States, should be disposed of as Congress may direct.

ATTORNEY GENERAL'S OFFICE,

November 16, 1838.

SIR: I have the honor to acknowledge the receipt of yours of the 11th of October last, requesting my opinion upon various

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points in relation to the Smithsonian legacy. A separate answer to each of your inquiries is deemed unnecessary, as the opinion I entertain, and am about to express in general terms, will be found to cover most of them.

James Smithson, of London, on the 23d day of October, 1826, executed his last will and testament; by which, upon the happening of certain contingencies, he bequeathed to the United States of America all his property, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men. The Congress of the United States, by an act passed 1st of July, 1836, accepted the bequest, and directed the President to appoint an agent to assert and prosecute the claim; and by the said act pledged the faith of the United States to apply the moneys and other funds which might be received to carry into effect the provisions of said will. By the 4th section of said act it is provided, "that, to the end that the claim to said bequest may be prosecuted with effect, and the necessary expenses in prosecuting the same be defrayed, the President of the United States be, and is hereby, authorized to apply to that purpose any sum not exceeding \$10,000," &c.

From these provisions, it appears to me that Congress intended that there should be no diminution of the funds bequeathed for the purpose specified in said will; but that the whole, whatever they might amount to, should be applied to carry into effect the intended object of the testator. And when the object of the bequest is considered, it cannot be supposed that Congress would act in any other than a liberal spirit.

My opinion, therefore, is, that the amount of the whole money and other funds received by the agent of the United States under the act of 1st of July, 1836, without reduction, constitute the Smithsonian fund, for the purposes specified in said Smithsonian will; and that the whole expenses of prosecuting said claim, receiving it, and transporting the same to this country, including any additional expenses which may have been incurred here, ought to be defrayed out of the appropriation made by Congress.

It appears that the cash and stocks, which, when converted into money, amounted to £106,490 11s. 9d., were decreed to

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the United States, as the amount of the legacy and bequest in said will. This sum, after deducting £116 2s. 2d., the amount of costs refunded, is the amount which should be paid to the Treasurer of the United States, to be kept and disposed of according to the provision of the acts of July 1, 1836, and the 6th section of the act of July, 1838; and all expenses, of whatever kind or nature, should be paid out of the appropriation made by Congress.

In relation to the disposition of the other personal effects of Mr. Smithson, which have been transferred to this country by the agent of the United States, my opinion is, that Congress should direct the disposition of them.

I have the honor to be, sir, your obedient servant,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

WHAT BANKS CAPABLE OF BECOMING PUBLIC DEPOSITORIES.

The act to regulate deposits of the public money authorizes the selection of banking corporations chartered by the acts of the legislatures of the different States, in those States, only, as depositories, plainly excepting private banking associations, and such as the North American Trust and Banking Company.

ATTORNEY GENERAL'S OFFICE,

November 17, 1838.

SIR: I have received yours of the 29th of October, in which you state that the North American Trust and Banking Company of New York have applied to your department to be selected as a depository of the public money, under the provisions of the act of Congress of the 22d of June, 1836; and you submit for my opinion the question, whether the associations formed under the general banking law of New York are corporations, within the meaning of the deposit law, and whether they can legally be selected by you as public depositories?

I have also to acknowledge the receipt of the arguments and opinions of three distinguished members of the New York bar, in favor of the application of the said company.

To determine upon the question thus submitted for my examination, recourse must be had to the act of 1836, entitled

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“An act to regulate the deposits of the public money;” as, upon the true construction of that act the decision of this question must mainly depend.

The language of the 1st section is, “That it shall be the duty of the Secretary of the Treasury to select, as soon as may be practicable, and employ as depositories of the money of the United States, such of the banks incorporated by the several States, by Congress for the District of Columbia, or by the Legislative Councils of the respective Territories for those Territories,” &c.

This provision contains the designation of the only kind of institutions which are authorized to be selected by the Secretary of the Treasury as depositories of the public money. It must be taken for granted that the Congress of the United States well understood the legal import and meaning of the terms used by them in their enactments. They say *banks incorporated* by the several States, &c. This must mean (for it can mean nothing else) banking corporations chartered by the acts of the legislatures of the different States, as they alone can incorporate State banks, or create State corporations. And any moneyed institutions, or banking associations, which are not corporations, and thus created, are not embraced within the meaning of the act. By the 3d section of the deposite act, every bank to be thereafter selected is, among other things, to furnish the Secretary of the Treasury with a copy of its charter.” What can this mean, but the act creating it, and specifying the terms and conditions of its existence?

In the arguments of counsel which have been presented for my consideration, it is conceded that the moneyed institutions about to be created under the act of the legislature of New York of April 18, 1838, are not, technically and strictly speaking, *corporations*. And if this concession were not made, and these institutions were to be tested by those legal rules and principles applicable to corporations, they would be found deficient in many of the legal requisites, such as a common seal, &c.

Instead of placing these institutions upon the footing of corporations, it might be more correct to say of them that *this* is their true character: that all the citizens in the State of New York had the right to use the privilege of banking until the

What Banks capable of becoming Public Depositories.

legislature of that State prohibited its exercise; and that the legislature of 1838 have restored that right to its citizens under certain limitations and restrictions calculated to secure the public against imposition and fraud. They have, however, by that act created no corporations; but have permitted banking associations, or moneyed partnerships, to be formed upon the terms and conditions specified in the said act.

At the time of the passage of the deposite act of 1836, there were in the United States two kinds of banking associations—one incorporated by the legislatures of the States; the other, private banking companies. Congress, looking to that state of things, declared that none but banks incorporated by the laws of the different States, &c., should become depositories of the public money. This at once put aside all private associations as depositories of the public moneys.

The system of banking about to be put in practice under the general banking law of New York was not then in use in the United States; and, therefore, cannot be presumed to have been within the view of Congress when they passed the act of 1836. Had that law, or any other similar to it, been in existence, and had institutions been already created and in operation under such law, Congress would then have been called upon to decide upon the expediency and propriety of employing them as public depositories. But such not being the fact, it would not become any executive officer to apply to such institutions the act of 1836, unless they should be clearly within its meaning, which is not believed to be the case.

The proper construction to be placed upon the deposite act of 1836 would be, in my opinion, to make it apply to such incorporated banks as were then known and in use, and others chartered or incorporated in like manner; and not to extend it to a species or kind of banking unknown and unused in the United States at that time, and the practical results of which are yet to be developed.

From the foregoing view, you will readily see that my opinion is adverse to the application of the North American Trust and Banking Company.

I am, sir, very respectfully, your obedient servant,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

Claim of Augusta for Expenses of Florida War.

CLAIM OF AUGUSTA FOR EXPENSES OF FLORIDA WAR.

The claim of the city of Augusta, for expenses incurred and supplies furnished on account of the public service for the defence of Florida, comes within the act of May 28, 1836, and ought to be allowed.

OFFICE OF THE ATTORNEY GENERAL,

November 17, 1838.

SIR: I have the honor to acknowledge the receipt of your communication of the 17th of October, with the accompanying papers, respecting the claim of the city of Augusta against the United States.

In forming an opinion upon the subject submitted for my examination, I shall be governed by those considerations alone which would have influenced my judgment had my opinion been asked immediately after the passage of the act of May 28, 1836; nor shall I consider any decision heretofore given by your department, as having the least effect upon the case before me. You having reopened the case, it now stands as though it had never been decided on, and no opinion heretofore expressed by your department should prejudice the claim of the applicants.

It appears that, upon the breaking out of hostilities by the Indians against the frontiers of Florida in the winter of 1835-'36, the city of Augusta, together with other cities in the south, promptly advanced money to procure a volunteer military force to march immediately to the frontier and protect the inhabitants. Every one in the least acquainted with emergencies of this character knows that, upon such occasions, the amount of expenditure is but little considered, and regular accounts are not kept; higher objects almost entirely engross the attention of those engaged in providing the relief which the country needs, and which the general government, on account of its remoteness, cannot furnish in proper time. In all such cases, more money is expended than is necessary in cases where the government has time to act for itself. Of all this, Congress was well aware when the act of the 28th May, 1836, was passed. The first section of that act provides "that the Secretary of War be, and he is hereby, directed to cause to be paid the expenses that have been incurred, and the supplies that have been furnished, in the States of South Carolina, Georgia, Alabama, Louisiana, and the Territory of Florida, on account of the

 Abandonment of Creek Reserves.

militia or volunteers received into the service of the United States, for the defence of Florida: provided, that the accounts for these claims shall be examined and audited at the treasury, as in other cases." The *expenses* that have been incurred, and the *supplies* that have been furnished, are to be paid for. From these expressions, I should infer that Congress did not intend that the Secretary of War should make further inquiry than to ascertain the amount expended, and the supplies furnished, and that they were on account of the militia and volunteers received into the service of the United States for the defence of Florida.

The proviso in this section is all that can create any difficulty; that requires "that the accounts for these claims shall be examined and audited at the treasury, as in other cases." This by no means imposes the necessity of applying the same tests to them that are applied to regular military expenditures; especially as, in the preceding part of the section, the only tests intended by the act are laid down; that is, "the expenses that have been incurred, and the supplies that have been furnished," &c. Besides, there was a propriety in having the accounts examined and audited, that it might be seen that the supplies and expenditures were not only made, but made *bona fide*, for the purposes specified in the act.

I am of opinion that the claim of the city of Augusta comes within the purview of the act of the 28th of May, 1836.

I am, sir, very respectfully, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

 ABANDONMENT OF CREEK RESERVES.

The removal of the Creek reservees from their reserved lands, without the intention of returning and occupying them as their place of residence, is an abandonment, which gives the right of possession and occupancy to the United States.

The right of the United States accrues and becomes complete immediately upon such abandonment.

ATTORNEY GENERAL'S OFFICE,

November 19, 1838.

SIR: I have the honor to acknowledge the receipt of yours of the 3d instant, with the accompanying papers, respecting the Talassee Fixico reserve under the Creek treaty of 1814.

Abandonment of Creek Reserves.

The substance of your first inquiry is, Has there been a voluntary abandonment of the land in controversy by the Indian reservee?

The treaty provides that, "upon the voluntary abandonment thereof [meaning the reserve] by such possessor, or his descendants, the right of occupancy or possession of such lands shall devolve to the United States, and be identified with the right of property ceded hereby."

In deciding the question of abandonment according to the foregoing provision in the treaty, nothing more is necessary than to ascertain that the reservee left and removed from the land, without an intention of returning and occupying it as his place of residence. His long absence from the reserve should at all times be considered as affording evidence of his original intention at the time of removal. In my opinion, the right of the government cannot be affected by any contracts or assignments made by the reservee, nor can his motives in making his removal have the least influence upon the title of the United States, except so far as the question of temporary or permanent absence might be involved.

The foregoing, as I understand it, is the *law* applicable to your first inquiry. It is not my province to decide upon the facts.

Your second inquiry presents the question, If there has been an abandonment, *when* did the right of occupancy and possession of said lands devolve to the United States, and this land become identified with the right of property ceded by said treaty?

My opinion is, that so soon as a voluntary abandonment and removal from the premises actually took place, from that time the right of the United States accrued, and was perfect and complete; and although the register and receiver could not act until they had a knowledge of such abandonment, still the rights of individuals might well and legally have their origin, to different portions of said land, according to the then existing laws, or laws which might thereafter be passed by Congress.

In answer to your third inquiry, I think that the act of the

Damages to Spanish Slave Owners, &c.

3d of March, 1817, has no application to the matter in question, but refers to an entirely different class of cases.

I have the honor to be, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

DAMAGES TO SPANISH SLAVE OWNERS OCCASIONED BY UNITED STATES TROOPS.

The United States are bound to pay the Spanish inhabitants of Florida the value of slaves carried away or killed by the troops of the United States shortly prior to the treaty with Spain of the 22d of February, 1819.

Remuneration should also be made for the services of such slaves as have been restored to their owners, during the period of time their owners were deprived of their services.

ATTORNEY GENERAL'S OFFICE,

December 18, 1838.

SIR: I have had the honor to receive your communication of the 11th instant, relative to the liability of this government, under the 9th article of the treaty between the United States and Spain, ratified on the 22d of February, 1819, to make remuneration for slaves killed, carried off, or detained by the troops of the United States, shortly prior to that treaty, and such slaves being the property of Spanish inhabitants in Florida.

In connexion with this subject, you ask my opinion on the two following points:

1. Are the United States bound to pay the claimants the value of slaves proved to have been carried away or killed by the United States troops, and thereby totally lost to their owners?

2. Whether remuneration is to be made for slaves carried off by the aforesaid troops, but subsequently restored, for the period their owners may have been by that reason deprived of their services?

The purpose of the last clause of the 9th article of the treaty referred to was to obtain from the United States remuneration for the losses and injuries which had been sustained by the Spanish inhabitants in Florida, by the then recent operation

Duty of Collectors of Customs, &c.

of the troops of this government. The treaty makes no distinction between the different kinds of property destroyed, or injuriously detained from the owners for a greater or smaller period of time. It had in view the then existing laws of Florida; and whatever those laws recognised as property, if destroyed, or injuriously detained from the owners thereof, comes within the scope and purview of the treaty. Slaves destroyed, carried off, or detained from the service of their owners, are of this description. In my opinion, therefore, the faith of the United States is solemnly pledged to make satisfaction to the owners of slaves in these, as in all other cases of injury to the rights of property contemplated by the treaty.

The laws of Congress of the 3d of March, 1823, and 26th of June, 1834, passed for the purpose of carrying this portion of the treaty into effect, confirm this view of the subject.

I therefore answer both inquiries in the affirmative.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

DUTY OF COLLECTORS OF CUSTOMS RESPECTING PAYMENTS
INTO THE TREASURY

It is the duty of collectors of customs to pay the duties collected by them into the treasury, although some of them may have been paid under protest, and importers shall have prosecuted to recover them back.

Where judgments shall be obtained against the collectors for overcharges of duties, the government ought to discharge them and relieve collectors of the consequences thereof.

Collectors should adjust the duties with importers at the time of the importation, and not leave them unascertained for any considerable time, as the practice will be pernicious in its consequences.

ATTORNEY GENERAL'S OFFICE,
December 19, 1838.

SIR: I have the honor to acknowledge yours of the 7th instant, in which you state that "it frequently happens, especially at large ports of entry, on the importation of some particular description of goods, that the importer disputes the duty to which the collector, acting under the instructions of the Comptroller, decides the articles in question to be liable under the

tariff laws. But with the view of getting possession of his goods, the importer pays under protest the amount of duty demanded by the collector; and, at the same time, gives that officer notice not to pay over the money to the government, and immediately institutes a suit against the collector to recover back the amount so paid."

Under these circumstances, the following question arises, viz: "Can the collector legally retain in his hands, beyond the control of the department, and distinct from his other funds arising from duties, moneys so received?"

In answer to this question, I would say that, under the laws of Congress in relation to duties on imported articles, it is the duty of the collector to carry into execution the instructions of the Treasury Department, and to conform his acts to them. If, in doing this, he shall collect more money than the judiciary shall afterwards, in an action against the collector by the importer, adjudge to have been due to government, there can be no doubt that it is the duty of the government to save the collector from injury. But the question you present is of a very different character. It is, whether the collector has the legal right to retain the money so received in his own hands, beyond the control of the department, &c. My opinion is, that no such right exists; and that the collector should, notwithstanding such protest and suit by the importer, pay over to the treasury all moneys by him received under such circumstances, as though no protest had been made or suit commenced. I am aware that it may be said this course would expose the collector to inconvenience and loss. The force of this suggestion is not perceived. Now, the collector keeps the money in his possession until the controversy is decided by the judiciary, and then pays over to the government what may be in his hands—that is, the whole collected by him, if the importer has failed in his action; or if the importer has succeeded, the balance which may be in his hands, after deducting the amount of the recovery against him. My impression is, that the law never intended that money collected for public purposes should be held by individuals to await the event of lawsuits. If the money be paid into the treasury, and a judgment be fairly obtained against a collector for an overcharge of duties, it would

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be the duty of the government promptly to discharge such judgment, and relieve the collector from its consequences.

You say a similar point arises, under the following circumstances: "On an importation of goods liable to cash duties, some time unavoidably must elapse before the duties thereon can be calculated, and the *exact* amount payable ascertained. It appears to be the practice in such cases to receive from the importer a sum of money deemed sufficient to cover the amount when ascertained, and any deficiency is afterwards made up, or the surplus refunded by the collector, as the case may be. These funds the collector designates as money taken and held for unascertained duties.

"The same question, therefore, as the foregoing is presented in this case."

It seems to me that the intention of those who originally framed our revenue laws was, that the duties should be ascertained and paid, where cash duties are imposed, before the goods are delivered to the owner. But it is understood that, in some ports, this is wholly impracticable; and therefore a departure in practice from the idea which I have suggested is indispensable. This state of things could not have been foreseen by those who originally passed the acts of Congress under which the revenue is still collected. The vast increase of the commerce of the United States, and its concentration at particular ports, render that impracticable which, at an earlier period, could easily be effected. If the law cannot be executed according to its letter and probable intention, on account of the altered condition of the affairs of the country, Congress alone can supply the proper remedy. In the mean time, however, until Congress shall act, such treasury regulations should be adopted and enforced as will best secure the objects of the law. It could never have been the intention of Congress that a collector should receive money for duties, under a private arrangement with the importer, and keep the money in his hands until it was convenient for him to cause the amount of duties to be ascertained. If such a practice were tolerated, it might be the interest of the collector to postpone the ascertainment of the duties; as, in the mean time, he would have the uncontrolled use of the money. It would also increase the

Claim of General Scott—Removal of Cherokees.

danger of faithlessness in the collector, by permitting large amounts of money to remain with him, and under his individual control, instead of being in the treasury of the United States. The tenor and spirit of all our revenue laws seem to inculcate the idea that the intention of Congress has at all times been, that money collected for revenue should be promptly placed in the treasury, and not be permitted to remain in the hands of the collectors; therefore, in any regulations you may make upon this subject, that object should be constantly kept in view.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

CLAIM OF GENERAL SCOTT FOR SUPERINTENDING REMOVAL
OF THE CHEROKEES.

The claim of General Scott for a compensation of eight dollars per day over and above his regular pay as major general, for superintending the removal of the Cherokees under the direction of the Secretary of War, cannot be allowed without violating the proviso to the act of 3d March, 1835.

ATTORNEY GENERAL'S OFFICE,
December 22, 1838.

SIR: I have examined the claim of General W. Scott, accompanying yours of this day, and have the honor to report the following opinion thereon:

General Scott is a military officer in the regular service and pay of the United States; and on the 6th of April, 1838, General Macomb, his superior officer, by his order, (which was strictly military, for no other could be issued by General Macomb,) directed him to repair to the Cherokee country, and there to discharge those duties which properly appertained to him as an officer of the army of the United States. On the 23d of May, 1838, the Secretary of War authorized General Scott to enter into arrangements with the agent of the Indians for their removal. On the 25th of June, 1838, he was directed by the Secretary of War to superintend the removal of the Indians. It is understood that General Scott faithfully discharged all the duties enjoined on him. He now charges eight

Navy Courts-Martial—Judges Advocate.

dollars per day for the services rendered under these orders, in addition to his pay and emoluments as a major general in the army of the United States; and the question you ask me to decide is, "whether he is lawfully entitled to the claim thus preferred by him?"

Whatever difficulty formerly existed relative to extra allowances or compensation to officers of the army, seems to me to be obviated by the proviso to the act of the 3d of March, 1835; which, upon a proper construction, in my opinion, forbids the allowance of the claim now under consideration. That proviso declares "that no officer of the army shall receive any per cent., or additional pay, extra allowance, or compensation, in any form whatever, on account of the disbursing any public money appropriated by law during the present session, for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description—"

Had the proviso stopped here, it might have been insisted that its whole operation was confined to appropriations made at the then session of Congress; but the following general and comprehensive expression is added: "or for any *other* service or duty whatsoever, unless authorized by law."

It appears to me that Congress intended by this expression to confine military officers to their regular pay and emoluments, and not to permit them to receive extra allowances or compensation for services which might not be considered by them in the strict line of military duties.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

NAVY COURTS-MARTIAL—JUDGES ADVOCATE.

Judges advocate of courts-martial are required to be sworn; and where the proceedings of such courts do not show that they were, it may be properly considered that the fact does not exist, and that they were not sworn, and that, therefore, the proceedings were irregular and void.

Navy Courts-Martial—Judges Advocate.

The accused may be put upon another trial; but not before the same officers who constituted the first court.

ATTORNEY GENERAL'S OFFICE,

December 24, 1838.

SIR: I have examined the proceedings of the general court-martial in the case of Peter Clark, a seaman in the navy of the United States, and have the honor of now submitting my opinion upon the various points submitted to me in your communication of the 20th instant.

The first inquiry is in relation to its not appearing in the proceedings of the court-martial that the judge advocate was sworn, agreeably to the act entitled "An act for the better government of the navy of the United States." My opinion is, that upon this branch of your inquiry the maxim well applies—that that which does not appear, should be considered as not existing; and, therefore, this question must be decided upon the assumption that the judge advocate was not sworn. When the very important duties of this officer are considered—that he is to keep the record of the evidence given, and the proceedings of the court; and that upon this evidence and proceedings, as recorded by him, the fate of the accused is ultimately to be decided,—every reflecting mind would concur in saying that the fidelity of this officer should be secured by at least the usual sanctions. Add to this that the Congress of the United States, in prescribing rules and regulations for the government of the navy, have given the form of the oath to be administered by the president of the court to the judge advocate, before proceeding to trial, and I think no doubt should exist in declaring the proceedings irregular and void. You will remark that the objection stated above goes to the construction and organization of the court. Had the court been regularly and legally organized, I should not think that its not appearing on the record that the prisoner had been furnished with a copy of the charges, or been asked if he had any objection to the members of the court, would be sufficient causes for setting aside the proceedings. If any injustice was done to the accused in these particulars, he should make the question before the court, and in that way make it appear on the face of the proceedings.

Right of Heirs of T. F. Reddick to a Patent for Lands.

In answer to your next inquiry, my opinion is, that the accused can be legally and constitutionally put upon another trial. He has not been tried by a tribunal legally competent to try and punish him. In our civil tribunals, if a party be convicted upon an insufficient indictment, and judgment be arrested, the accused may be again put upon his trial; and this is not considered as an infraction of that injunction of the constitution which forbids that any person be twice put in jeopardy for the same offence.

In answer to your last inquiry—which is, whether the same officers who have acted upon the court martial, the proceedings of which are now under examination, would be competent to sit on a second trial of the accused; or whether it would be necessary to organize a new court for such trial?—I am decidedly of opinion that a new court, should you think the case requires further action, must be organized. The officers who sat on the former should all be excluded from the second trial. They have formed and expressed opinions upon the case, which would disqualify them from serving as jurors in a criminal case in a common-law court; and I can see no reason why officers under the same circumstances should not be excluded from a court-martial, and especially as they are the triers of the facts as well as the law.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

RIGHT OF HEIRS OF T. F. REDDICK TO A PATENT FOR LANDS.

The United States are bound by their treaty stipulations with France, and by the universal usage among civilized nations, to go on and perfect the title of the heirs of Thomas F. Reddick to a tract of land on the bank of the Mississippi, held under a Spanish grant and relinquished by act of Congress of 1st July, 1836, unless the same shall be taken by an older and better claim not emanating from the United States government; and no such title having been set up, a patent ought to issue to the said heirs.

ATTORNEY GENERAL'S OFFICE,

January 2, 1839.

SIR: I have had the honor to receive your communication of the 24th ultimo, with the accompanying papers, relative to

Right of Heirs of T. F. Reddick to a Patent for Lands.

the conflicting claims of Thomas F. Reddick's heirs, and Marsh and others, to a tract of 640 acres of land situate on the bank of the Mississippi river, about 18 miles above the mouth of the Des Moines river, in fractional township number sixty-six, north of the base line, of range number five west of the fifth principal meridian.

I deem it unnecessary to give a separate answer to each of the interrogatories or questions propounded in your letter; believing that the present case may be properly decided without an explanation of my views in relation to some of the matters involved in your inquiries. Congress, by the act of the 1st of July, 1836, "relinquished all the right, title, claim, and interest that the United States have in and unto the said six hundred and forty (640) acres of land to the said Thomas F. Reddick's heirs, with the following proviso: That if said lands shall be taken by any older or better claim not emanating from the United States, the government will not be in anywise responsible for any remuneration to said heirs; and provided, also, that should said tract of land be included in any reservation heretofore made under treaty with any Indian tribe, the said heirs be, and they are hereby, authorized to locate the same quantity, in legal divisions or subdivisions, on any unappropriated land of the United States in said territory subject to entry at private sale."

If this act of Congress be available to the heirs of Reddick for no other purpose, it at least proves that the claim set up by them is fair and honest, and such a one as the United States are bound to satisfy in some way under the treaty ceding Louisiana to them. Taking it, then, for granted that the original claim of Tesson, which is dated the 30th of March, 1799, and under which Reddick's heirs derive their title, gave him an inchoate right to the land in controversy, (as is proved and admitted by the act of Congress above referred to,) I will proceed to examine whether it can be affected by the last proviso in said act (of July 1, 1836.)

The first question which arises is, whether this land was reserved by any Indian treaty, so as to affect the title of Reddick's heirs?

In the treaty of the 4th of August, 1824, between the United

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States and the Sacs and Foxes, there is this provision: "It being understood that the small tract of land lying between the rivers Des Moines and the Mississippi, and the section of the above line between the Mississippi and the Des Moines, is intended for the use of the half-breeds belonging to the Sac and Fox nations; they holding, however, by the same title and in the same manner as other Indian titles are held."

From this, it is evident that no other or greater title is vested in the half-breeds to this particular tract of land, than was originally held by these tribes to that portion of the land described in the said treaty to which the Indian title was thereby extinguished. It gave the half breeds the Indian right of occupancy, not the title in fee. This the United States was competent to do; they might, if the consent of the Indian tribes could be obtained, extinguish the Indian title, or not, at their pleasure; and no individual claimant to lands occupied by the Indians would have just cause of complaint. But, to transfer the land to which an individual has a just and legal claim, presents a very different case. While this land was the property of Spain, that government granted it to Tesson, who immediately settled upon it; and he, and those claiming under him, have occupied the same ever since.

The second article of the treaty with France by which the United States acquired the territory in which this land is situated, and which is dated the 30th of April, 1803, provides, "that in the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices, which are not private property," &c.

No difficulty, it seems to me, can arise as to the true meaning of this article. It is a cession of the public, not of the private property of individuals; and this is in conformity to the public law, as understood and practised by all civilized nations: which is, where a cession of territory is made by one nation to another, it is understood to pass the sovereignty only, including the public property, but does not affect the rights of private property; and if any doubt could exist on this subject, it would be removed by the expression used in the treaty.

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'The *vacant* lands are ceded; which shows that the intention of the parties was not to interfere with lands owned by individuals.

It has already been stated that the grant of Tesson was made in 1799, and that possession was taken immediately thereafter; and such possession was continued until after an execution sale of the land on the 15th of May, 1803, and for two years thereafter, about which time Thomas F. Reddick, the ancestor of the claimants, on the one part, in this case, became the purchaser, and took possession. During the occupation of Tesson, several improvements were made on said land; cabins were erected, and enclosures made; and an orchard, consisting of one hundred trees, planted, and several arpens of land cultivated in different years. This possession, improvement, and cultivation, must have been known and sanctioned by the Indians. No complaint whatever appears to have been made by them. I therefore think it not unreasonable to infer, from these circumstances, that they (the Indians) knew of the grant to Tesson made by the Spanish government, and recognised the same; and, therefore, the following article, which was added to the treaty of November 3, 1804, applies to the case under consideration: "Additional article.—It is agreed that nothing in the treaty contained shall affect the claim of any individual or individuals who may have obtained grants of land from the Spanish government, and which are not included in the general line laid down in this treaty: provided that such grants have at any time been known to the said tribes, and recognised by them." From this, it seems that the Sacs and Foxes, as well as the United States, did not intend, by any agreement or treaty of theirs, to impair the rights of grantees under the Spanish government. It was understood by both parties that such claims existed; and, under certain circumstances, their validity is acknowledged by the foregoing article.

It is a sound rule of law, that all statutes made on the same subject shall be taken into view, and construed together, when the object is to ascertain the true meaning of the legislature relative to the subject matter of such statutes. The same rule should be applied in relation to treaties or compacts made between the same parties. Therefore the foregoing "*additional*

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article” ought to be considered as in full force, and applicable to all the subsequent treaties and proceedings between the same parties, it never having been changed or annulled by them, but, on the contrary, expressly reaffirmed by another portion of these tribes and the United States in the year 1815.

It is insisted that the act of June 30, 1834, vests the title to the land in controversy in the half-breeds of the Sac and Fox tribes of Indians. This cannot be maintained if the views which I have presented be correct. That act only provides that the right, title, and interest, which might accrue or revert to the United States, to the reservation of land lying between the rivers Des Moines and Mississippi, which was reserved for the use of the half-breeds belonging to the Sac and Fox nations, now used by them, or some of them, under the treaty of 1824, is relinquished, and vested in the said half-breeds, with full power to sell or devise, &c.

By this act the half-breeds are to have all the right, title, and interest to the reservation which might accrue or revert to the United States, &c.

Now, suppose the Indian title had been extinguished to the whole tract of country given by this act to the half-breeds in the ordinary way by purchase and removal of the Indians; would it have been said that the 640 acres of land now claimed by Reddick’s heirs could have belonged to the United States, and been subject to their disposal? or, on the contrary, would not all men have concurred in saying that the land was the property of Reddick’s heirs, and that the United States were bound by their treaty stipulations with France, and by the universal usage among civilized nations, to go on and perfect the title? If this be so, I can see no principle upon which the claim of the half-breeds, or their assigns, can be sustained. It ought never to be presumed that the government intended to make two grants for the same lands, or that it intended to grant land again which had been granted by the government under which it derives title; and if a construction can be put upon the acts of government which will avoid such an effect, it ought to be done in this case. Although the exterior boundaries of the reservation in the treaty of 1824 embrace the land in controversy, still it by no means follows that Congress intended

Continuation of the Construction of the Cumberland Road.

to convey it to the half-breeds; because, in the first place, there is a body of valuable land (this being excepted) on which the act of June 30, 1834, did operate and transfer to the half breeds. In the next place, the language of the act itself, upon a sound interpretation, excludes the land in controversy. I am therefore of opinion that a patent should issue to Reddick's heirs.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

CONTINUATION OF THE CONSTRUCTION OF THE CUMBERLAND ROAD.

By force of the act of 3d March, 1837, modifying that of July 2, 1836, the question whether the work in each State on said road shall be executed continuously or not, is left to the discretion of the Secretary of War; except that in the exercise of his discretion, he must observe the last proviso of the act of 3d March, 1837.

ATTORNEY GENERAL'S OFFICE,

January 4, 1839.

SIR: In answer to yours of the 3d instant, asking my opinion as to the legality of ordering the work on the Cumberland road to be conducted continuously, I have the honor to state that, prior to the act of July 2, 1836, the manner of conducting the work in each State, whether continuously or otherwise, seems to have been left to the direction and discretion of your department. By the 2d section of the act above referred to, Congress directed that the moneys appropriated by that act, for the construction of said road in the States of Ohio and Indiana, should be expended in completing the greatest possible continuous portion of said road in the said States. This provision took away from your department its discretion upon the subject upon which my opinion is now asked.

By the 2d section of the act of the 3d of March, 1837, entitled "An act to provide for continuing the construction and for the repairs of certain roads, and for other purposes, during the year 1837," it is declared that the 2d section of an act for the continuation of the Cumberland road, in the States of Ohio, Indiana, and Illinois, approved the 2d of July, 1836, should

Power of Secretary of the Treasury over Banks in Wisconsin.

not be applicable to expenditures hereafter to be made on said road.

This, in my opinion, restores to your department the power it possessed before the passage of the first act; and, whether the work in each State on said road shall be done continuously or not, is again left to the discretion of your department, except that, in the exercise of that discretion, a compliance with the last proviso contained in the first section of the act of the 3d of March, 1837, must be observed.

Your obedient servant,

FELIX GRUNDY.

To the SECRETARY OF WAR.

POWER OF SECRETARY OF THE TREASURY OVER BANKS IN WISCONSIN.

The Secretary of the Treasury has no legal authority to investigate the condition of the banks of Wisconsin Territory against their consent.

Such a power is not conferred by their charters, nor by any of the acts of Congress confirming them.

ATTORNEY GENERAL'S OFFICE,

January 9, 1839.

SIR: I have received yours of the 8th instant, asking my opinion as to the power of your department to examine into the condition of the banks of the Wisconsin Territory against their consent.

In the opinion now to be given, I wish to remark, that I refrain altogether from the expression of any views in regard to the right of a legislative body to examine into the condition of a corporation created by it. Whether such right exists, and is inherent in the law-making power, without any express reservation to that effect, is not necessary now to be considered; the question presented being merely whether your department possesses the authority to do so.

In the charter accompanying your letter there is no such authority conferred; nor is any reference made to your department, either in the charter or the act of Congress confirming it. I

Seizure for suspected intention to prosecute Slave-Trade.

cannot, therefore, see any authority which you possess to investigate the condition of said banks against their consent.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

SEIZURE FOR SUSPECTED INTENTION TO PROSECUTE SLAVE-TRADE.

Where the American consul at Havana, to whom an American brig reported herself, suspected her papers to be fraudulent, and not such as to entitle her to the protection which belongs to vessels sailing under the American flag, and ordered the commander of a ship of war lying at that port to seize and detain her until the government could be advised of the facts and direct as to the course to be adopted; and a correspondence having ensued between said consul and the Captain General of Cuba, disposing of the question of the violation of the sovereignty of Spain, in making the seizure in the port of Havana; and the question under the several navigation acts, and the laws to prohibit the slave-trade, being presented as to the legality of the seizure, and the course to be pursued under the circumstances—**DECIDED**, that, whenever there is just cause to believe that any merchant vessel is engaged in an illicit trade, a public vessel has the right to detain her until our government can act upon the subject; and that the question of the violation of the sovereignty of any foreign government in nowise affects the question in respect to the liability of the suspected vessel to seizure under such circumstances.

Although the laws turn out to be improvident for the punishment of just this species of fraud, it was competent for the consul to give the order, and for the public vessel to make the seizure and detention—nevertheless, without further proof that the vessel was engaged or arranged to be engaged in the slave trade, further proceedings should not be taken in the premises.

ATTORNEY GENERAL'S OFFICE,

January 12, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 9th instant, accompanied by the communication of the consul of the United States at Havana, and the correspondence between him and the Captain General of that place; and you ask my opinion upon the subject-matter embraced in these documents.

That a public vessel of the United States has the right, on the high seas, to detain a merchant vessel of the United States, and to take possession of it, and retain that possession until the government can act upon the subject, where there is just cause

Seizure for suspected intention to prosecute Slave-Trade

to believe that such merchant vessel is engaged in an illicit trade forbidden by the laws of Congress, I presume no doubt can be entertained.

In this case, it appears that Captain Howell, commander of the brig "Thomas, of Havana," entered the port of Havana, and immediately reported to Mr. Trist, United States consul at that place. The papers of the vessel presented by him to the consul were evidently fraudulent, and not such as, under the laws of Congress, would entitle his vessel to that protection which is due to every vessel which in truth belongs to the United States, and sailing lawfully under their flag. Under these circumstances, Mr. Trist informed Captain McKenney, commander of the Ontario, a public vessel of the United States, of these facts; and advised him to seize and detain the vessel until this government could be advised of the facts, and direct what course should be adopted. The advice of Mr. Trist was pursued, and Captain McKenney took possession of the brig Thomas, while in the port of Havana. The vessel was of Spanish build, and was manned entirely (the captain excepted) by foreigners; and the number of men on board was much greater than is usually employed in navigating a vessel of the size of the brig Thomas. These were circumstances, in addition to the fraudulent character of the papers, calculated to excite strong suspicions that the vessel was destined for some unlawful enterprise, and probably for the slave trade.

A correspondence ensued between the Captain General of Cuba and Mr. Trist, which terminated in a friendly disposition of the question, whether the seizure of the vessel in the port of Havana was a violation of the jurisdictional rights of Spain. Upon that point, now adjusted and settled, I wish to be understood as expressing no opinion.

Upon another point which presents itself it is proper that I should say, that, let the question discussed between the Captain General of Cuba and the consul of the United States be as it may, so far as relates to Captain Howell and his vessel the proceedings were lawful, and Captain Howell has no cause of complaint. Suppose the Spanish authorities had given their consent to the seizure before it was made; then, what legal rights would have been violated? None, that I can perceive,

Seizure for suspected intention to prosecute Slave-Trade.

more than if the seizure had been made on the high seas. In this case, the consent of the Spanish authorities was not obtained before the seizure; but this could only make the act wrongful, if the Captain General was correct in his view of the public law, so far as the Spanish authorities and Spanish rights were concerned. It would not make the seizure wrongful, so far as relates to Captain Howell and his vessel. If an officer, in executing civil process, shall break open the house of the defendant and arrest him, the officer is subject to an action and to damages for breaking the house; but the arrest is good.

I refrain from any argument showing the inapplicability of the principles of the public law in reference to the protection of vessels in the ports or waters of a friendly power, when that protection is claimed by a vessel of the United States against their public vessels, acting in conformity to, and in execution of, the laws of Congress.

Upon the latter inquiry made in your letter, as to the sufficiency of the proof to warrant a prosecution for any offence against the laws of the United States, I regret to say that, after a careful examination of our navigation acts, and the acts prohibiting and punishing the slave trade, I am unable to find any providing sufficiently against such misconduct, in regard to the papers of a vessel, (as Captain Howell had practised,) which will subject him to legal punishment. Nothing short of a revision of these acts, with additional penal provisions, embracing cases not foreseen when these laws were passed, will save the American flag from abuse, and from being prostituted to the vilest purposes. I doubt whether the proof exhibited would be sufficient to subject Captain Howell's vessel to condemnation, under the first section of the act of the 3d of March, 1819, entitled "An act in addition to the acts prohibiting the slave trade;" for, although there can be no doubt of its sufficiency to warrant a seizure, still it might be deemed insufficient to warrant a final condemnation. Therefore, without additional evidence, connecting his proceedings at Key West with a design to engage in the slave trade, I would not advise any further proceedings against him or his vessel.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF STATE.

Choctaw Reservees under Dancing Rabbit Creek Treaty.

CHOCTAW RESERVEES UNDER DANCING RABBIT CREEK TREATY.

The only requisites to a title to reservations under the treaty of Dancing Rabbit creek, indicated in the treaty, are, that the persons applying be Choctaws and heads of families, and shall signify their intention of becoming citizens of the States within six months from the ratification of the said treaty.

ATTORNEY GENERAL'S OFFICE,
January 30, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 28th instant, with the accompanying documents.

Your first inquiry is, whether the 14th article of the treaty of Dancing Rabbit creek is to be confined to the heads of families who have made improvements, or to be extended to each head of a Choctaw family desirous to remain and become a citizen of the States, who shall have signified his intention to the agent within six months from the ratification of the treaty?

The language of the 14th article is, "Each Choctaw head of a family, being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of the treaty, and he or she shall thereupon be entitled to a reservation," &c.

The only requisites here indicated are, that the person applying be a Choctaw head of a family, and shall signify his intention of remaining and becoming a citizen of the States within six months from the ratification of the treaty. To superadd that they (the Choctaw heads of families) shall have made improvements, would be making a very important change in the treaty, not warranted, it seems to me, either by its letter or spirit. The latter part of the same article (14th) makes a special provision in reference to those who may reside on their lands, but contains nothing which restricts the right to claim reservations to that class of individuals.

As to your second inquiry, my opinion is, that the act of the 3d of March, 1837, was designed by Congress (and such is its fair construction) that the whole subject in relation to the lands covered by the contiguous locations made by Mr. Martin should

Territorial Judges not liable to Impeachment.

be reserved for the final action of Congress. This is apparent from the 7th section of said act.

And the intention of Congress to this effect is clearly manifested by the act of the 22d of June, 1838, entitled "An act to grant pre-emption rights to settlers on the public lands." My opinion is, that you ought not to act in the case of Susan Colbert, until Congress shall have declared its will upon the claim which has been located upon the same lands. It is not intended by me to intimate any opinion as to the validity of the respective claims.

Yours, with great respect,

FELIX GRUNDY.

To the SECRETARY OF WAR.

TERRITORIAL JUDGES NOT LIABLE TO IMPEACHMENT.

Territorial judges, not being constitutional but legislative officers only, and not civil officers within the meaning of the constitution, are not subject to impeachment and trial before the Senate of the United States.

ATTORNEY GENERAL'S OFFICE,

February 1, 1839.

SIR: Since you referred the letter of Judge Doty to this office, that gentleman has called on me, and stated that he wished to withdraw his application to you, and only desired my opinion upon a single point—that is, whether Territorial judges were, under the constitution of the United States, liable to, and subject to removal by, impeachment? This point is raised by his letter which was referred to me, and I therefore proceed to give my opinion on it.

The provision in the constitution which relates most directly to this subject is contained in the 1st section of the 3d article, which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office "

Territorial Judges not liable to Impeachment.

The construction of this part of the constitution has been settled, it seems to me, by the opinion of Congress, expressed by various acts, and also by the decisions of the Supreme Court of the United States.

By the article of the constitution referred to, the judges are to hold their offices during good behavior. Congress cannot, consistently with this provision, provide any other or different tenure of office within the States.

Congress has, in most cases, limited the tenure of office of Territorial judges to four years. This could not be done, were they judges under, or provided for by, the constitution; because, by that instrument, the tenure is during good behavior. It should be noticed, that Congress has imposed this limitation of four years, not in a single instance only, but in many. It has been imposed in the Territories embraced within the limits of the original States, where the territory has been ceded to the general government, and Territorial governments have been created therein. It has also been done in the territories purchased by the United States from foreign nations. I think these acts clearly prove the sense of Congress to be, that Territorial judges cannot be judges under the constitution, but are mere creatures of legislation.

I have said that the Supreme Court of the United States have also decided this point. In the case of the American Insurance Company and others *vs.* Contee, reported in 1 Peters, the court very distinctly recognise the opinion above expressed, and convey their views in the following strong language:

"These courts, [meaning Territorial courts,] then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited. They are incapable of receiving it; they are legislative courts, created in virtue of the general rights of sovereignty," &c.

The only remaining inquiry is, as to the liability of Territorial judges to impeachment under the constitution.

The fourth section of the second article of the constitution is in these words: "The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

What Banks capable of being Public Depositories.

If the construction of the constitution be correct, (as I suppose it is,) that these judges are not constitutional but legislative judges, I see nothing in the constitution which would warrant their being embraced by the expression—"and all civil officers of the United States." They are not civil officers of the United States, in the constitutional meaning of the phrase; they are merely Territorial officers, and therefore, in my opinion, not subject to impeachment and trial before the Senate of the United States.

I have the honor, &c., &c.,

FELIX GRUNDY.

To the PRESIDENT OF THE UNITED STATES.

WHAT BANKS CAPABLE OF BEING PUBLIC DEPOSITORIES.

The Bank of America having paid out bills of other banks of a denomination less than five dollars, has incapacitated itself from being a depository of the public money.

ATTORNEY GENERAL'S OFFICE,

February 4, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 2d instant, accompanied by the letter of the President, the resolution of the board of directors, and the statement of the cashier of the Bank of America; and my opinion is asked as to the legality of employing that bank as a depository of the public money, under the provisions of the act of the 23d of June, 1836, entitled "An act to regulate the deposits of the public money."

The 5th section of that act declares, "That no bank shall be selected or continued as a place of deposit of the public money, which shall not redeem its notes or bills on demand in specie; nor shall any bank be selected or continued as aforesaid, which shall, after the 4th day of July, 1836, issue or pay out any note or bill of a less denomination than five dollars," &c.

The latter branch of the foregoing provision is alone applicable to the question under consideration. The language used by Congress is very comprehensive; it embraces not only banks

What Banks capable of being Public Depositories.

which may issue their own notes of a less denomination than five dollars, but it says, "or may pay out any note or bill of a less denomination than five dollars." This, evidently, according to its literal meaning, would include the notes or bills of all other banks; and if the spirit of the act is regarded, no doubt can exist. The object of this section of the act was to prevent, so far as Congress had the power, the circulation of small notes. That object would be entirely defeated if a bank shall be considered exempt from the disability created by the act, which should merely refrain from making and putting into circulation its own notes of a less denomination than five dollars, and should receive and pay out notes of other banks to any amount of the forbidden description. Congress would have done nothing towards the accomplishment of its object, if such a construction be placed upon this section of the act. And Congress must have foreseen that their provision would be wholly inoperative, unless they went further than barely to include banks which should issue their own notes of a less denomination than five dollars; they, therefore, used the very broad and comprehensive expression, "or may pay out any note or bill of a less denomination than five dollars." I therefore conclude that the true construction is to embrace all banks which shall have paid, or shall pay out, notes or bills of a less denomination than five dollars, whether such notes or bills be on their own or any other bank.

The next inquiry is, Has the Bank of America done anything which excludes it from being a depository of the public money?

I think so; it has, according to the admission of its officers, during the suspension of specie payments, received and paid out, in the course of its business, notes of a less denomination than five dollars. It is true this is said to have been done by the tellers of the bank, without any order or resolution of the board of directors directing them to do so. The tellers are officers or agents of the bank; they are appointed by the directors, and give bond and security to the bank for the faithful discharge of their duties.

So far as relates to receiving and paying out money, a bank acts by its tellers and clerks, and their acts must be viewed as

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the act of the bank; and more especially should this be the case in the absence of all evidence showing that the conduct of the clerks and tellers was disapproved of, and the practice discontinued so soon as the superior officers of the bank became acquainted with it.

In conclusion, I will remark, that Congress authorized the connexion between the government and the banks; and it prescribed the terms upon which that connexion might be created and continued. In this instance that connexion has been dissolved by the bank itself; and it cannot be renewed, under the deposite law of 1836, by virtue of any legal authority existing in your department, derived from that act.

I have the Honor, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

TO WHOM PATENTS FOR CREEK RESERVES SHALL BE ISSUED.

On completion of payment for Creek reserves conveyed by the reservees to other persons, certified by some person appointed by the President for that purpose, and approved by the President himself, patents must issue to the purchasers. It will not be a compliance with the treaty of 24th March, 1832, to issue patents in such cases where the right is controverted to the original reservees to abide the result of suits and to inure to the successful parties.

ATTORNEY GENERAL'S OFFICE,

February 7, 1839.

SIR: I have considered the subject referred to this office by yours of the 21st ultimo, respecting the Creek reservations under the treaty of the 24th of March, 1832. You say in substance, that a request has been preferred to you to issue the patents for the lands in controversy to the original Creek reservees, that the respective claimants may have a fair opportunity of trying their rights before the courts in Alabama; the patents to inure to the benefit of the successful parties.

However reasonable this proposition may appear, a preliminary question presents itself: Have you the power to make this disposition of the subject?

The third article of the treaty of the 24th of March, 1832, entered into between the United States and the Creek tribe of Indians, is as follows: "These tracts [meaning Creek reserva-

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tions] may be conveyed by the persons selecting the same to any other persons for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed by the President for that purpose, but shall not be valid till the President approves the same; a title shall be given by the United States on the completion of the payment." By this it appears that, by a solemn compact between the contracting parties, a tribunal was created which is to decide to whom the patents are to issue, and that tribunal is the President of the United States. In the discharge of this duty, he is to guard the rights of the Indians against frauds and impositions, at the same time that he protects the rights of the United States. Until the President has acted in compliance with the duties enjoined on him by the treaty, I can see no authority in any other department of the government to interfere with these titles; nor can the President delegate such authority, either directly or indirectly, to another tribunal.

The treaty authorizes the Creek reservees to sell their lands and convey them for a fair consideration. The fact of sale, and the fairness of the consideration, are all to be inquired into; and the contracts are to be certified to the President by a person selected by himself for the purpose. Still, the contract is not valid until the President approves the same; nor is a title to be given until the whole consideration shall have been paid, &c. Surely, to issue the patents to the original reservees, where they have sold their lands, would be an evasion of the treaty stipulation. The fact of sale, the fairness of the consideration, and the completion of the payment, would all be tried and decided on in a manner and by a tribunal different from the one designated by the treaty.

There are other reasons which might be suggested against the issuing the patents in the manner proposed, which need not be enumerated at this time. My opinion is, that the President must act agreeably to the provisions of the treaty before any patents can issue for the lands selected as reservations, and which have been sold by the reservees.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

Transfers of Appropriations to the Surplus Fund.

TRANSFERS OF APPROPRIATIONS TO THE SURPLUS FUND.

The law does not require a transfer of the unexpended balance of the appropriation made by Congress for carrying into effect the treaty of December 29, 1835, with the Cherokees; and, although two years have elapsed, Congress has shown no disposition to abandon the project of their removal, but, on the contrary, passed acts to promote the object.

Wherefore, it is competent for the War Department to make a requisition for such unexpended balance.

ATTORNEY GENERAL'S OFFICE,

February 14, 1839.

SIR: I have received yours of ———, enclosing the communication of the Secretary of the Treasury to you; from which it appears that there is in the treasury an unexpended balance of \$1,231,848 66, being the balance of an appropriation to carry into effect the treaty with the Cherokees of December 29, 1835; said appropriation being made by the act of July 20, 1836. You also state that this money is required to carry into full effect the said treaty; and that inconvenience will result from a transfer of it to the surplus fund, as the Indians are entitled to receive it upon their arrival at their new homes in the west, they being now on their way thither.

It seems to me that the law does not require that this unexpended balance should be transferred to the surplus fund. The second section of the act of May 1, 1820, points out the duties of the different Secretaries in regard to subjects of this kind, and, in my opinion, fully warrants your department now to make the requisition for this unexpended balance. The object of that section, as well as the first section of the act, was evidently to have the surplus money refunded, which had been appropriated for particular objects, and which remained on hand after the accomplishment of the said objects. And it could never have been the intention of Congress to impede or defeat the prosecution of an object while in the progress of accomplishment, and which Congress had itself directed to be accomplished. Otherwise, they would never have inserted the following proviso at the end of the second section: "*Provided*, That when an act making an appropriation shall assign a longer duration to the accomplishment of its object, no transfer of any unappropriated balance to the account of the surplus fund

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shall be made until the expiration of the time fixed in such act."

This shows that the limitation of two years was introduced for the purpose of embracing moneys not needed for the objects contemplated at the date of their appropriation, but not to defeat the objects designed to be accomplished by Congress. By the treaty with the Cherokees, article 16, it is stipulated and agreed that they shall remove to their new homes in two years from the ratification of the treaty. All parties expected that the removal would be effected within that period. Had this been done, the money appropriated, and which is now in the treasury, would have been expended within the two years after its appropriation. The Indians could not be removed within the two years, for reasons which I need not mention. The last of them are now probably on their way to their homes west of the Mississippi, and will be entitled to this money upon reaching the place of their destination. Congress has shown no disposition to abandon the object of this appropriation—that is, the removal of the Cherokees; so far from it, that, since the appropriation was made, Congress have passed acts to promote this same object. I am, therefore, of opinion that the unexpended balance of the appropriation referred to should not be carried to the surplus fund, but be applied as originally directed by Congress.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

CLAIM OF GENERAL SCOTT TO COMPENSATION FOR SUPERINTENDING REMOVAL OF CHEROKEES.

The claim of General Scott for compensation, at the rate of eight dollars per day over and above his regular salary, for arranging and superintending the removal of the Cherokees, even though he were a special commissioner to effect that object, cannot properly be allowed.

ATTORNEY GENERAL'S OFFICE,
February 15, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 7th instant, enclosing General Scott's letter. All the

Claim of General Scott—Removal of Cherokees.

views and arguments presented by him were considered before my opinion of the 22d of December, 1838, was given; except that the fact of his appointment by the President, as commissioner to make arrangements with the Cherokees for their removal, was not known at this office. That fact produces no change in my opinion. The proviso to the act of the 3d of March, 1835, operates upon the claim set up by General Scott, acting under such an appointment, as fully as if he had acted without it. Such, I am of opinion, is the fair construction of the act of Congress; nor do I see any reason, in the nature of this claim, why it should be exempt from the full operation of the proviso of said act.

In this case, a major general of the army of the United States, in the receipt of his full pay and emoluments of office, has been directed to proceed to the Cherokee country, and by force, if necessary, to cause a removal of the Indians agreeably to treaty stipulations; but the President, desirous to prevent violence and bloodshed, gave to General Scott authority to make arrangements or contracts for the removal of the Indians, if thereby the objects of the treaty could be accomplished on reasonable terms, and without a resort to force. Under this authority General Scott acted, and acted faithfully and successfully. But, has he even an equitable claim for the \$8 per diem claimed by him while engaged in this service? I think not. When performing this service, he was receiving his pay and emoluments as major general; and by virtue of the authority conferred upon him as commissioner, he was enabled to change his character from that of a destroying warrior to that of a kind pacificator. The duty was easier and of a more agreeable character. Upon the whole case, I am of opinion that General Scott has no right to the money claimed by him, either in law or equity.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

Reprieves and Pardons.

REPRIEVES AND PARDONS.

The power of the Executive to grant reprieves and pardons extends to the remission of fines, penalties, and forfeitures, and costs in criminal cases, and may be exercised in degrees at different times at the discretion of the incumbent of the office.

A portion of a sentence may be remitted at one time, and another portion of it at another time, and by another Executive.

And the same power is possessed by the Executive over a judgment after security for its payment shall have been given, as before.

ATTORNEY GENERAL'S OFFICE,

February 16, 1839.

SIR: In yours of the 12th of February, 1839, my opinion is asked as to the power of the President to remit the costs in the case of the United States *vs.* Martin.

The constitution of the United States clothes the Executive with the power "to grant reprieves and pardons," &c. This power has been construed to extend to a remission of fines, penalties, and forfeitures; and the power to remit the costs in criminal cases, after judgment against the defendant, has been exercised, and has never been questioned, so far as I can learn. The view taken upon the subject seems to have been, that the costs are a part of the judgment or sentence; and the same constitutional power which can remit a portion of the sentence, may remit the whole sentence. This practice has prevailed so long, and is so well sanctioned by a fair construction of the constitution, that I presume it ought not at this day to be disturbed.

The only remaining inquiry is, Has anything occurred which deprives the Executive of the United States of the power which he possessed over the judgment at the time it was originally rendered in this case? The late President issued his pardon, releasing Martin from his imprisonment, upon his paying or securing the costs which had accrued in the prosecution. The said Martin did give security for the payment of the costs in two years, and was thereupon discharged from his confinement. That the Executive, possessed of the pardoning power, may exercise it in part at one time, and in part at another, I think can admit of no doubt. The pardoning power given by the constitution, is plenary, cases of impeachment only ex-

Construction of an Appropriation Act.

cepted. Its exercise, and the mode of its exercise, are placed, without condition or limitation, wholly in the discretion of the President. He may, therefore, in my opinion, pardon or remit a portion of the sentence at one time, and a different portion at another. I therefore do not think that the remitting the imprisonment by the late Chief Magistrate, upon condition of the defendant's paying or securing the costs, deprives the present Chief Magistrate of the power of remitting the costs, the payment of which was so secured.

The giving sureties to secure the costs cannot, in a legal point of view, affect the power of the President. The security is but collateral. It is the judgment that is to be discharged; and if the money were paid by the sureties, it would be in satisfaction of that judgment. I should therefore conclude that the President possesses the same power now over the judgment, which he possessed at the time of its rendition.

The expediency or in expediency of exercising the pardoning power, in the form and in the case now presented, is a subject exclusively within the power and discretion of the President; and in relation to which I therefore forbear to express any opinion.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF STATE.

CONSTRUCTION OF AN APPROPRIATION ACT.

Where an appropriation act for the expenses of preventing and suppressing Indian hostilities expressed a sum for the aggregate less than the aggregate, in fact, of the several items therein enumerated—DECIDED, that the amount equal to all the items was appropriated, and that an erroneous addition of said items produced no effect upon the law.

ATTORNEY GENERAL'S OFFICE,

March 13, 1839.

SIR: Yours of yesterday proposes for my opinion a question arising upon the act of the late session of Congress, entitled "An act making appropriations for preventing and suppressing Indian hostilities for the year 1839." The difficulty arises from the fact that the gross sum stated in the first section of

Plats of Rivers, Creeks, &c., in Louisiana.

the act is less than the amount of the several items which are enumerated in the act.

The phraseology of the first section of the act seems to me to obviate all difficulty. It is, "that the following sums, amounting to one million eight hundred and four thousand seven hundred and seventy-four dollars, be, and the same are hereby, appropriated out of any money in the treasury not otherwise appropriated."

The sums enumerated and specified in the act are appropriated; and a mistake in the addition or otherwise, which shall produce an erroneous result as to the amount, can produce no effect upon the appropriation. The different items of appropriation should be looked to and respected; these Congress certainly intended to have effect, and an error which shall make the aggregate amount either greater or less than the different sums enumerated in the act should not be regarded. The appropriation would be perfect without the addition of the gross sum. The unnecessary insertion of a mistaken amount, in my opinion, produces no legal effect whatever.

Yours, with great respect,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

PLATS OF RIVERS, CREEKS, &c., IN LOUISIANA.

The plats returned to the General Land Office by surveyors general, are evidence of the existence and general character of rivers, creeks, bays, &c., which the law requires to be marked upon them, and may be regarded as affording full proof for the purposes of settling pre-emptions and locations.

Mistakes in these plats may occur, and when they do, may be corrected; but with respect to transactions occurring and private rights acquired upon the faith of the accuracy of the plats, and before the correction of their mistakes, they should be left undisturbed wherever it is possible.

ATTORNEY GENERAL'S OFFICE,

March 13, 1839.

SIR: I have had the honor to receive your communication of the 22d of January last, submitting for my opinion the following question arising under the act of Congress approved

Plats of Rivers, Creeks, &c., in Louisiana.

June 15, 1832, entitled "An act to authorize the inhabitants of the State of Louisiana to enter the back lands."

"When the tract sought to be entered is fit for cultivation, and borders upon a river, creek, bayou, or water-course, which is surveyed and laid down on the plat of surveys officially returned to the district and general land offices, are or are not the General Land Office and the district land office bound to respect it as such? or can they, after a private entry of the tract of land claimed as a back pre-emption right, with a view of permitting the entry by a back pre-emption, and avoiding the private entry, go into parol testimony to contradict the return of the surveyor general, by showing that there is no such river, creek, bayou, or water-course as he has protracted?"

In reply to this question, my opinion is, that the official plats returned by the surveyor general to the General Land Office and the several district land offices, are evidence of the existence and general character of those natural objects which the law requires to be marked upon them, and that they must be considered as affording full proof for these purposes—so far at least as the action of the land officers, both general and district, are concerned. These plats are designed by law for the information and guidance of the various land officers and persons desirous of purchasing a portion of the public domain. That purchases are made, and other legal acts often done, exclusively upon the faith of these plats, admits of no doubt; and all such transactions ought, in my judgment, to be protected. That mistakes will occasionally occur in making the surveys of the public lands, and drawing the plats of those surveys, must be expected; some power of correcting them should, therefore, be allowed, with a view to future action. But, with respect to transactions occurring and private rights acquired upon the faith of the accuracy of the plats, and before the correction of their mistakes,—these should be left undisturbed, wherever this is possible.

The nature of the inquiry presented to me renders a more specific answer to it impracticable in a legal point of view.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

Extra Compensation to Clerks for Extra Services.

EXTRA COMPENSATION TO CLERKS FOR EXTRA SERVICES.

Clerks and others holding regular appointments to places created, and receiving specific salaries affixed thereto by law, are not entitled to additional allowances for services rendered the government as the agent for surveying and selling Indian lands, the same being prohibited by acts of Congress.

ATTORNEY GENERAL'S OFFICE,
March 15, 1839.

SIR: I have had the honor to receive your communication of the 13th instant, asking my opinion upon two questions arising under the 3d section of the act of Congress approved the 3d instant, entitled "An act making appropriations for the civil and diplomatic expenses of the government for the year eighteen hundred and thirty nine."

These two questions are as follows:

1. "A treaty exists with an Indian tribe, by which the general government becomes the agent of that tribe in surveying and selling its lands, the expenses of which are to be paid out of the proceeds of those lands. In the performance of this duty, it has heretofore been deemed proper to require the services of clerks and others holding regular appointments to places created, and receiving specific salaries affixed thereto by law, and to allow them for the services thus required a stated compensation, in addition to their regular and fixed salary, payable out of the proceeds of said lands. The additional allowances, in some cases, have been fixed by general regulations; and in others, by decisions of the competent officer on claims advanced thereto. Will the continuance of this arrangement be inconsistent with the above act?"

2. "An individual in the service of the government receives a specific salary or compensation, fixed by law or regulation, for the performance of a certain duty, or class of duties. By an arrangement made prior to the passage of the above law, certain other duties are assigned to him, which in no manner are connected with, related to, or interfere with, the proper execution of the duty or class of duties first named. For these 'certain other duties' it was agreed to allow him an additional and specific compensation. Is the continuance of such an arrangement as this forbidden by the act referred to?"

Transfers of Creek Reservations.

Having carefully compared these two cases with the provisions of the act referred to, I am of opinion that they come within its prohibitions.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

TRANSFERS OF CREEK RESERVATIONS.

Transfers of reservations by assignees, whose assignments express them as a firm, are not valid when executed by one member thereof, but only when executed by all, unless the partner assigning exhibit authority to assign from all. But where the reservee assigned to a firm, as to "M. W. Perry & Co.," and the transfer by the firm was signed in that manner, the assignment is valid, and the patent may issue to the assignee.

Where there are two assignors, and the names of both to the assignment are in the same handwriting, the assignment is invalid as to him who did not sign, unless the other exhibit authority.

Where approved contracts are endorsed in blank, with the names of first purchasers endorsed thereon, the endorsement of the name of the purchasers on the approved contracts is evidence of their having disposed of them; and possession by others is sufficient evidence to warrant the issuance of the patents to those having possession of the approved contracts.

These assignments are not required to be acknowledged, and ought not to be made subject to any rule made after they were executed.

Possession of a contract is not sufficient evidence of a legal transfer.

ATTORNEY GENERAL'S OFFICE,

March 16, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 6th instant, enclosing a communication to you of the 4th instant from the Commissioner of the General Land Office, in which my opinion is asked upon six distinct questions—all relating to transfers of reservations under the Creek treaty of the 24th of March, 1832.

It appears that the late President of the United States, in April, 1836, had directed patents to be issued only to the Indian reservee, or to the immediate purchaser from him. Subsequently, Congress passed the act of the 5th of July, 1838, entitled "An act to authorize the issuing of patents to the last *bona fide* transferees of reservations under the treaty between the United States and the Creek tribe of Indians, which was concluded on the 24th of March, 1832."

By this act, the President of the United States "is authorized

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and required to cause patents to be issued to such person or persons as may be the *bona fide* purchaser, owner, assignee, or transferee of any selection or reservation which has been made to, or in behalf of, any chief or head of an Indian family," under the said treaty, "whatever may have been the number of intermediate transfers or assignments: provided the person or persons applying for such patent or patents shall adduce satisfactory proof to the Commissioner of the General Land Office of the fairness of said several preceding transfers or assignments."

The intention of Congress in passing this act evidently was to carry into effect contracts which had been made for reservations, which contracts had been approved by the President, and which, from the lapse of time, the death and removal of parties and witnesses, had become incapable of being proved without recourse to courts of equity. And even before these tribunals the remedy would often be difficult and uncertain.

In applying the law to particular cases, it should be borne in mind that, at the date of these transactions, no particular form of transfer had been pointed out, either by law or regulations of the General Land Office. And the act above referred to only provides that the person applying for a patent shall adduce proof, satisfactory to the Commissioner of the General Land Office, of the fairness of the several preceding transfers or assignments. Congress has not designated the kind of evidence which the Commissioner shall receive or require; he is left at full liberty to adopt such rules of proof and evidence as the justice and equity of the case may demand. Although his discretion is broad and comprehensive, still it is not arbitrary, but must be regulated by those rules of law and equity which afford security to the rights of each citizen of the community.

With these preliminary remarks, I will proceed to an examination of the particular questions propounded, in the order in which they are presented by the Commissioner of the General Land Office.

1. "As to cases in which the approved contracts are in favor of a *firm* styled thus: 'Shorter, Tarver, & Shorter,' with a transfer signed and written as above, by one of the partners, purporting to convey the interest of all of them."

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In such a case I would say that, by the assignment to "Shorter, Tarver, & Shorter," an interest in the approved contract was vested in each of these three individuals, which could not be divested without his consent, evidenced by his own act or signature, or by some person legally authorized to act for him in that particular. I am therefore of opinion that a transfer made by one of them, by signing the names of all, does not transfer the right of those who have not signed; and, to make such an assignment available, it must be shown that the individual making the assignment was authorized by the others to make it. This may be shown by an express power of attorney, by articles of copartnership giving such authority, or by the parties giving their present assent to it. Anything short of the course I have pointed out, would not only be a departure from the law, which permits no property to be taken from any individual in cases like the present, without his consent, shown in some authentic manner; but a contrary practice would expose one partner and his legal representatives to all the dangers arising from the faithlessness or frauds of another.

2. "Cases in which the approved contracts are in favor of a company thus: 'M. W. Perry & Co.,' with a transfer signed in that manner."

In my opinion, the Commissioner of the General Land Office is not bound to search for and ascertain who the members of this company may be. M. W. Perry is the only person he can legally know, or take notice of; therefore, if an assignment be made to M. W. Perry & Co., and M. W. Perry shall have made an assignment in the same manner, the patent should issue to such assignee, if there be no other difficulty in the case.

3. "Cases in which the approved contracts are in favor of individuals, giving their names in full, thus: 'Eli S. Shorter' and 'John T. Scott,' with a transfer signed in that manner; but both names to the assignment being apparently in one and the same handwriting."

I consider the answer to the first question as a full answer to this inquiry.

4. "Cases in which the approved contracts are endorsed in

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blank, by having simply the names of the first purchasers endorsed thereon."

The endorsement of the name of the purchaser on the approved contract is evidence of his having disposed of it; and the possession of it by another person (no other claim to it being presented) is, in my opinion, sufficient evidence to warrant the issuance of a patent to the party having possession of the approved contract.

5. "Cases in which a transfer is executed on the approved contract, without being acknowledged before any officer authorized to take acknowledgments."

I would remark, that there is no law requiring these assignments to be acknowledged before any officer; and it would frequently operate very unjustly to subject these assignments to the operation of a rule made after they were executed; and the proviso to the act of July 5, 1838, certainly did not contemplate the production of an assignment, acknowledged before an officer authorized to take acknowledgments, as the only evidence of assignment which should be received by the Commissioner, or they would have used the language "that the person or persons applying for such patent or patents shall adduce satisfactory proof to the Commissioner of the General Land Office of the fairness of said several preceding transfers or assignments." It might be very proper to make regulations requiring assignments to be acknowledged before certain officers, applicable to assignments made after such regulations should be made and promulgated; but it would be very unjust to subject past transactions to such regulations, and, in my opinion, would, in this instance, be contrary to the intention of Congress, as expressed in the above proviso.

6. "Cases in which the approved contract is in possession of a party claiming to be owner, who relies on such possession as sufficient evidence of ownership, in the absence of any written evidence of transfer."

It is indispensable in all these cases that evidence should exist showing that the owner has disposed of and divested himself of his interest. This can only be done by some act of his—such as making an assignment in the usual form, or placing his name upon the back, or some other part of the

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approved contract; thereby acknowledging the blank assignment to be filled up by the owner or person to whom he has delivered the same. But, in the cases to which you refer, there is no evidence whatever of any disposition of the approved contract having been made by the original owner thereof. Possession, unaccompanied by any other evidence showing a right, would not, in my opinion, justify the issuing of a patent to these claimants. The possession may have been acquired improperly and illegally.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

 PRIORITY OF RIGHT TO CONFIRMED LANDS IN MISSOURI.

The inhabitants of the village of St. Charles, under the laws of the 13th June, 1812, the 26th May, 1824, and the 27th January, 1831, have precedence and priority over Peter Chouteau, whose claim to land was confirmed 4th July, 1836, and the claim of the latter must be located elsewhere upon the public domain.

All sales and locations made of lands claimed under unconfirmed titles derived from France or Spain, between the 26th of May, 1830, and the 9th of July, 1832, are valid.

If it be claimed that this construction violates treaty obligations, the answer is, that the parties must go to the judiciary for a decision declaring void an act of Congress, not to the Executive department.

ATTORNEY GENERAL'S OFFICE,

March 18, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 9th of January last, asking my opinion upon two questions raised in a letter from the Commissioner of the General Land Office to you, dated September 13th, 1838. My attendance upon the late session of the Supreme Court and other urgent business have prevented an earlier reply.

The first question referred to me relates to the conflicting claims of the inhabitants of the village of St. Charles and Peter Chouteau.

In relation to Chouteau's claim, it appears that on the 9th of July, 1832, an act of Congress was approved, entitled "An act for the final adjustment of private land claims in Missouri."

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The first section of this act provides, "That it shall be the duty of the recorder of land titles in the State of Missouri, and two commissioners to be appointed by the President of the United States, by and with the advice and consent of the Senate, to examine all the unconfirmed claims to land in that State, heretofore filed in the office of said recorder, according to law, founded upon any incomplete grant, concession, warrant, or order of survey, issued by the authority of France or Spain, prior to the 10th of March, 1804, and to class the same so as to show—first, what claims, in their opinion, would in fact have been confirmed according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under them, at New Orleans, if the government under which such claims originated had continued in Missouri; and, secondly, what claims, in their opinion, are destitute of merit in law or equity under such laws, usages, customs, and practice of the Spanish authorities aforesaid; and shall also assign their reasons for the opinions so to be given."

Under this provision of the law, the recorder and commissioners proceeded in the discharge of their duties, and subsequently reported to Congress their opinions in favor of various claims; among which, was this claim of Chouteau.

Upon the reception of this report, Congress, by the act of July 4th, 1836, entitled "An act confirming claims to land in the State of Missouri, and for other purposes," confirmed the claims upon which the commissioners had decided favorably, with certain specified exceptions. Among those confirmed, Chouteau's was included.

The second section of the act, however, provides, "That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the right acquired by such location or purchase; but the individual or individuals whose claims are hereby confirmed shall be permitted to locate so much thereof as interferes with such location or purchase, on any unappropriated land of the United States within the State of Missouri or Territory of Arkansas, in whichever the

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original claim may be, that may be subject to entry at private sale.

If, therefore, upon locating any of the claims confirmed by the first section of this act, it shall be ascertained that it covers in whole or in part any other tract previously located under any former law of the United States, then the claimant whose title is thus confirmed by the act shall not be entitled to the same, but be allowed to locate elsewhere upon the public domain. The only remaining inquiry, then, is, Had this land in controversy been previously located, under any law of the United States, by any other person or persons? or, in other words, had it been located or appropriated for the inhabitants of St. Charles, under the laws of Congress of the 13th of June, 1812, the 26th of May, 1824, and the 27th of January, 1831, relating to the settlement of various land claims in Missouri, and, among others, to the claim of the town or village of St. Charles now in controversy?

The first section of the act of Congress of the 13th of June, 1812, entitled "An act making further provision for settling the claims to land in the Territory of Missouri," confirms to certain towns and villages therein specified (among which is the village or town of St. Charles) their rights, titles, and claims to certain lots or lands "which had been inhabited, cultivated, or possessed by them, prior to the 20th of December, 1803," and directed the surveyor general to survey the said lots or lands, and transmit plats thereof to the General Land Office.

On the 26th of May, 1824, an act supplementary to this act was approved; the second section of which directs the surveyor general, among other things, "to survey and designate, so soon after the passage of this act as may be, the commons belonging to the said towns and villages, [among which was the village or town of St. Charles,] according to their respective claims and confirmations, under the said act of Congress, [of 13th of June, 1812,] where the same has not already been done."

On the 27th of January, 1831, another act of Congress was approved, relating almost exclusively to this same subject. It is entitled "An act further supplemental to the act entitled 'An

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act making further provision for settling the claims to land in the Territory of Missouri,' passed the 13th day of June, 1812."

The first section of this act is in these words: "That the United States do hereby relinquish to the inhabitants of the several towns or villages of Portage de Sioux, *St. Charles*, St. Louis, St. Ferdinand, Ville a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, and Little Prairie, in the State of Missouri, all the right, title, and interest of the United States, in and to the town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to, the said towns or villages, confirmed to them, respectively, by the first section of the act of Congress entitled 'An act making further provision for settling claims to land in the Territory of Missouri,' passed the 13th day of June, 1812; to be held by the inhabitants of the said towns and villages *in full property*, according to their several rights therein, to be regulated or disposed of for the use of the inhabitants, according to the laws of the State of Missouri."

This law clearly confirms the previous survey and locations of this land under the previous laws of 1812 and 1824, and makes a complete *legislative grant* of it to the village or town of St. Charles. And a legislative grant undoubtedly confers as good and valid a title, in every respect, as a patent regularly and fairly issued under the laws of the United States. That the land in controversy, then, had been located and granted to the village or town of St. Charles, under a law of Congress, prior to the 4th of July, 1836, when Chouteau's claim to the same, or a portion of the same land, was confirmed by Congress, admits of no doubt; and the contingency provided for in the second section of the same act has therefore occurred; and Chouteau's claim, so far as it interferes with the rights of the inhabitants of St. Charles, must, according to the provisions of the second section of this act, be located, if located at all, elsewhere upon the public domain. If this is not such a case as was contemplated by Congress in the second section of the act referred to, I can conceive of none to which that provision can be more appropriately applied. I am sensible, however, of the importance of the principles involved in the consideration and decision of the relative merits of these conflicting

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claims—principles involving the plighted faith and honor of the nation, expressed in the solemn form of a treaty. I am aware, too, that it may possibly be said that the law of Congress referred to, being in violation of the rights of private property recognised and sanctioned by a national treaty, should be pronounced void. I am not called upon to decide that question. If a law of Congress is to be pronounced void in a case like the present, the General Land Office is not the proper forum for such purpose; and until it is so declared or pronounced by a competent tribunal, the General Land Office should follow its plain and obvious directions. And such, in my judgment, are its directions in the present case.

The second question submitted for my consideration is, “whether sales or locations made of lands claimed under unconfirmed titles derived from France or Spain, between the 26th of May, 1830, when the act of the 26th of May, 1824, expired, and the 9th of July, 1832, when the act for the final adjustment of private land claims in Missouri was approved, are valid?” This question, in my judgment, admits of no doubt; so far as relates to the action of the General Land Office, such entries and locations are to be treated as valid.

Leaving the rights of all parties to be ultimately decided on by the judiciary, my opinion and advice is, that no patent should issue from the General Land Office, under the confirmatory act, for lands already granted by Congress, or for lands located under and in pursuance of any law of the United States prior to the passage of the act above referred to.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

THE CHEROKEE FUND NOT LIABLE FOR DAMAGES, &c.

The Cherokee fund is not liable for damages arising from the non-filment by the government of contracts made for the removal of, and supplies for, the Cherokee Indians.

ATTORNEY GENERAL'S OFFICE,

March 20, 1839.

SIR: Your letter of the 16th instant is before me, in which you ask my opinion upon the following point:—whether the

The Cherokee Fund not liable for Damages, &c.

money agreed by the United States to be paid for the cession of land made by the treaty of 1835, with the Cherokees, or the sum appropriated by the law of the 12th of September last, is liable for the damages claimed in the three cases enumerated in your communication?

I have given to this subject a careful and anxious consideration, and now proceed to give you the result of my reflections. The three cases are the following:

1. Williamson Smith made a contract with the government for the removal of the Cherokees to the west of the Mississippi. He, at great expense, prepared himself to fulfil his engagement, and actually removed a portion of them, and was ready to proceed and effect an entire removal.

2. Clemens, Bryan, & Co., made a contract for provisioning a portion of the Cherokees in their removal. To enable them to comply with their contracts, they made large purchases of cattle, provisions, &c., which have been thrown upon their hands, much to their injury, &c.

3. Langtry and Jenkins contracted to deliver three thousand pairs of shoes for the Indians, at the Indian agency, at \$1 30 per pair. They purchased the shoes, and carried them to the agency, according to contract; they were not received, because John Ross, the new agent for the removal of the Cherokees, refused to receive them; by reason of which a considerable loss has been sustained by Langtry and Jenkins. All these contracts appear to have been fairly entered into by persons authorized to make them on the part of the government; and the contract with Williamson Smith was even approved by the Commissioner of Indian Affairs, before its completion. If nothing more existed in these cases, the conduct of the government would be indefensible in refusing to proceed in the fulfilment of its engagements. But a cause did exist, which, in the opinion of those to whom the constitution and laws intrusted the removal of the Indians, required arrangements of a different character, and wholly inconsistent with those already made. There was a moral necessity—a high overruling policy—which demanded that a removal of the Indians should be effected, if practicable, without bloodshed, or the destruction of those who, however misguided, however great their errors, are enti-

The Cherokee Fund not liable for Damages, &c.

tled to the paternal care of the general government. This object could be accomplished, and, as was believed, could *only* be accomplished, by the employment of John Ross, one of the Cherokee chiefs, as removing agent. A contract was accordingly made with him; and this, of course, annulled all preceding contracts; and annulled them, too, without the consent of the individuals who were parties to the same. In this state of things, what should now be done? Justice and good faith both require, in my opinion, that prompt and full indemnity be made to those who have suffered loss, by a failure of the government to fulfil its contracts.

I have examined the treaty with the Cherokees, of the 29th of December, 1835, the 15th article of which is as follows: "It is expressly understood and agreed between the parties to this treaty, that, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee nation east," &c. The third supplemental article of the treaty gives the Cherokees \$600,000, to include the expense of their removal, and all claims of every nature and description not herein otherwise provided for," &c. The second section of the act of the 12th of June, 1838, adds the further sum of \$1,047,067, for the same purposes as the third supplementary article above cited, with the further object of subsisting them for one year after their removal west.

Neither in the treaty nor in the law can I discover anything which would warrant an application of any part of the Cherokee fund to the payment of damages sustained by individuals, by the non-compliance on the part of the United States with contracts made with such individuals. My opinion, therefore, is, that although the demand for indemnity made by the persons whose cases have been referred to me is well founded, and should be promptly and liberally met, still you have no power

Pensions to Widows and Children of Paymasters.

to apply any portion of the fund provided by the treaty or law to any such purpose.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

PENSIONS TO WIDOWS AND CHILDREN OF PAYMASTERS.

Widows and children of paymasters of the army who shall have died while in service, by reason of wounds received in actual service, are entitled to the benefit of the fifteenth section of the act of the 16th of March, 1802, fixing the military peace establishment.

ATTORNEY GENERAL'S OFFICE,
March 22, 1839.

SIR: By yours of the 15th instant, my opinion is asked whether the widows and children of paymasters of the army are entitled to the benefit of the fifteenth section of the act of the 16th of March, 1802, fixing the military peace establishment of the United States?

It was decided by my immediate predecessor, in an opinion given on the 16th of March, 1836, that the fifteenth section of the act referred to was still in force. Adopting that opinion (which accords with my own) as correct, the only inquiry is, Does it embrace paymasters? The language is, "That if any commissioned officer in the military peace establishment of the United States shall, while in the service of the United States, die by reason of any wound received in actual service of the United States, and leave a widow," &c.

Paymasters are nominated by the President, and confirmed by the Senate, and then commissioned by the President. They are then commissioned officers; they belong to the military branch of the public service, and are at all times subject to the orders of the War Department. It therefore seems to me that they are clearly within the terms and meaning of the fifteenth section of the act of the 16th of March, 1832; and,

Arrears of Pensions—To whom to be Paid.

of course, my opinion is, that the widow and children are entitled to the benefit of the provisions of said section.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

ARREARS OF PENSIONS—TO WHOM TO BE PAID.

Arrears of a pension due a navy pensioner at the time of his death must be paid over to his legal representatives. It does not revert to the navy pension fund.

ATTORNEY GENERAL'S OFFICE,

March 23, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 9th ultimo, in which you state that Hamlet Moore, a navy pensioner, died on the 19th of October, 1838; that, under the act of Congress of the 3d of March, 1837, for the more equitable administration of the navy pension fund, he was entitled to arrears of pension from the date of his injury received in the naval service. And my opinion is asked, whether his arrears of pension, not being received by him in his lifetime, shall revert to the navy pension fund, or be paid to his legal representatives?

The second section of the act referred to declares "that the pensions which may have been granted to officers, seamen, and marines, in the naval service, disabled by wounds or injuries received while in the line of their duty, shall be considered to commence from the time of their being so disabled," &c.

So soon as this law passed, the pensioner became entitled, in my opinion, to his arrearages of pension, as fully as he was to the pension itself; and although he died without having received what was due to him, still the money does not belong to the navy pension fund, but must be paid over to his legal representatives.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

Power of Postmaster General over Mail Contracts.

POWER OF POSTMASTER GENERAL OVER MAIL CONTRACTS.

Where one of two or more contractors for transporting the United States mail shall have been guilty of a violation of the twenty-eighth section of the act of the 2d July, 1836, changing the organization of the Post Office Department and providing more effectually for the settlement of the accounts thereof, the Postmaster General may annul the contract and relet the route according to law.

ATTORNEY GENERAL'S OFFICE,
March 25, 1839.

SIR: Yours of the 23d instant is before me: in it you state that a case has occurred, in which it is established to your satisfaction that an individual has been guilty of a violation of the 28th section of the act of the 2d of July, 1836, entitled "An act to change the organization of the Post Office Department, and to provide more effectually for the settlement of the accounts thereof." You also state that this individual is a partner in one or more contracts with your department for the transportation of the mail. And my opinion is asked as to the effect of the exercise of the power conferred on you by the act referred to, and in what way it can be exercised, consistently with the provisions of said act?

You have decided on the exercise of the power; that point is confided to you exclusively by law. The next inquiry is, does his being a partner only, and not the sole contractor, in other cases, make any difference, in a legal point of view, as to your power over those contracts? The act declares, "and if any person so offending be a mail contractor, he may be forthwith dismissed from the service of the department," &c.

My opinion is, that the offending partner can only be dismissed by annulling the contract; or, in other words, if one partner is dismissed, all are discharged thereafter from their obligations or engagements to the department. I know of no law which would authorize the Postmaster General to look to the other partners and the securities for a performance of the contract, after dismissing one of the partners. Should it be said that there is a hardship imposed upon the unoffending partner in annulling the contract on account of the misconduct of the other partner, the answer is a plain and obvious one:

Contracts for Supplies or Services for the Navy.

it is his misfortune to have united himself with a man regardless of his duties and obligations to the public; and it is better that he should bear this inconvenience than that the public interest should be sacrificed. Besides, should any other course of action be pursued by you, the prohibitions of the act of Congress on this subject could easily and at all times be evaded. Some one partner could always be placed in a position where proof of guilt could not reach him.

Being of opinion that, under the post office act of 1836, the act of one partner operates upon the whole contract, and that you cannot legally dismiss one partner without discharging all, my advice is, that you proceed to relet the route according to law.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the POSTMASTER GENERAL.

CONTRACTS FOR SUPPLIES OR SERVICES FOR THE NAVY.

All purchases and contracts made by the Navy Department should be under the direction of the Secretary of the Navy.

Where the public exigencies do not require the immediate delivery of the article or performance of the service, in such cases it is necessary previously to advertise for proposals respecting the same, unless the article be a steamboat or some similar structure.

Where immediate delivery is necessary to the wants of the public service, the article required must be obtained by open purchase.

OFFICE OF THE ATTORNEY GENERAL,

March 25, 1839.

SIR: I have received yours of the 22d instant, asking my opinion as to the construction of the act of the 3d of March, 1809, "further to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments." The difficulty arises upon the following provision in said act: "All purchases and contracts for supplies or services which are or may, according to law, be made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made by open purchase, or by previously advertising for proposals respecting the same."

Contracts for Supplies or Services for the Navy.

Your predecessor (Mr. Branch) obtained from Mr. Berrien, then Attorney General, his opinion upon the subject, on the 29th of August, 1829. The result of that opinion was—

“1. That all purchases and contracts made by your department must be made and entered into by or under your direction.

“2. That where the public exigencies do not require the immediate delivery of the article, or performance of the service, in such cases it is necessary previously to advertise for proposals respecting the same.

“3. Where immediate delivery is necessary to the wants of the public service, the article required must be obtained by *open purchase*—that is, by purchase at the places where articles of the description wanted are usually bought and sold, and in the mode in which purchases are ordinarily made between individual and individual.”

Of the correctness of this opinion I entertain no doubt; still, there are cases which, from their nature, must be considered as forming just exceptions to the rule laid down. These exceptions must consist of cases which plainly and manifestly were not within the view and design of Congress when the law was passed, and which cannot, without injury to the public service, be subjected to the operation of the rule laid down. To illustrate my views as to cases to be excepted from the operation of the general rule, I will name one on which you will have probably to act—the construction of steam frigates for the protection of our maritime frontier, directed by an act of the last session of Congress. Such a means of defence was not thought of thirty years ago, when the act in question was passed. To place the construction of the machinery of such vessels in incompetent hands, (which would probably be the case, if the plan of advertising and receiving proposals were pursued,) would be, in effect, to convert them into instruments to destroy the lives of our citizens, instead of saving and preserving them. In such a case, every just rule of construction forbids its being included or embraced by said act. The same remark might be made in regard to many other cases which could be named. I forbear to enumerate more, because the application of the rule, as laid down by this office in 1829, as

Extra Compensation to Salaried Officers.

modified by the suggestions now made, will enable you to decide correctly upon each case as it may occur.

I am, sir, &c.,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

EXTRA COMPENSATION TO SALARIED OFFICERS.

Extra compensation to persons entitled to salaries may be allowed only where money shall have been appropriated for the particular services, for the rendition of which it is claimed as a compensation.

In a case of a general appropriation of a sum of money for the accomplishment of a particular object, no part of it can be paid to a person receiving an annual salary, unless the services rendered are directed to be paid for by the act.

Payment for such services cannot be made out of the contingent fund.

ATTORNEY GENERAL'S OFFICE,

April 4, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 29th ultimo, in which you state several difficulties which present themselves, under the 3d section of the act of Congress of the 3d March last, "making appropriations for the civil and diplomatic expenses of the government for the year 1839."

The section referred to is in these words: "That no officer, in any branch of the public service, or any other person, whose salaries or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation shall be authorized by law."

In construing this section, no difficulty could arise, were it not for the introduction of the expression—"unless the said extra allowance or compensation shall be authorized by law." This evidently creates an exception to the general prohibition; and the extent of this exception is the only point to be settled. To construe the exception as embracing all the cases which had been sanctioned by the Supreme Court of the United States, and the executive officers of the government, as authorized by former laws, would be to make this section inoperative, and leave the law unaltered in its practical effect.

Extra Compensation to Salaried Officers.

To say that no extra allowance or compensation should in any case be made to persons having salaries, pay, or emoluments fixed by law and regulations, would be in direct contravention of the act itself, which clearly contemplates their allowance in certain cases; that is, in such cases as are authorized by law.

Both these constructions must, therefore, in my opinion, be laid aside; and such construction be adopted as will carry into effect the intention and meaning of Congress.

The most striking evil under former laws was, that money placed in the hands of officers for disbursement, under general or specific appropriations, was withheld by them in several instances, under a claim for compensation for services rendered, as was alleged, not within their ordinary duties. These claims were in some instances allowed by the judiciary, and in this way money appropriated by Congress for particular objects was diverted from its proper destination. The act before me cannot fail to prevent similar occurrences. There were other supposed evils of a like character existing—such as the application of a portion of a general appropriation, and the contingent funds of the departments, to the payment of persons receiving salaries, pay, or emoluments fixed by law, for services the payment of which had not been directed by any act of Congress. In my opinion, the term “authorized by law,” as used in this act, must be construed as equivalent to the expression “authorized by act of Congress;” and that, in looking for the authority of law to warrant these payments, our researches are to be limited to the provisions which Congress has made upon this subject; and that, to bring a case within the exception contained in this 3d section, not only must the money be appropriated by an act of Congress, but it must be expressly appropriated for the particular services, for the rendition of which it is claimed as a compensation. This construction, it seems to me, would effect the objects intended by Congress. The consequences of the application of this principle will be—1st. That in case of a general appropriation of a sum of money for the accomplishment of a particular object, no part of it can be paid to a person receiving an annual salary, or pay and emoluments fixed by law, for any services he might render in relation to it, which

Extra Compensation to Salaried Officers.

services are not directed to be paid for by the act. 2d. No portion of the contingent fund of a department can be applied to the payment of extra services rendered by any person receiving an annual salary, or whose pay or emoluments are fixed by law; because no particular services are designated in the acts making such appropriations, to which the money, or any part of it, is to be applied.

Instead of answering your inquiries separately, I have given you what I consider the true construction of the act in question; and leave to you the application of the rule laid down, to the different cases as they may be presented for the action of your department. There is, however, one case to which you have invited my attention, upon which it may be proper for me to be more explicit: it is in relation to the extra expenses of the officers engaged in the survey of the coast of the United States. In my opinion, the act under consideration has no application to officers engaged in this service. By the act of the 10th of February, 1807, a survey of the coast of the United States was directed to be made; and, to effect this important object, the President was clothed by that act with very large discretionary powers; and the sum of \$50,000 was placed at the disposal of the President, for the prosecution of the work, without any particular directions being given in the act as to the application of the money. This act, which was considered obsolete, was revived by the act of 10th July, 1832, entitled "An act to carry into effect the act to provide for a survey of the coast of the United States;" and by the latter act, the President is authorized to employ all persons in the land and naval service of the United States, and the sum of \$20,000 is appropriated towards carrying said act into effect. This act, I think, fully authorizes the President to employ land and naval officers in this particular service, and to make an allowance for their extra expenses.

I am, sir, &c., &c.,

FELIX GRUNDY

To the SECRETARY OF THE TREASURY.

Transfer of Specific Appropriations to Contingent Fund.

TRANSFER OF SPECIFIC APPROPRIATIONS OF HOUSE OF REPRESENTATIVES TO CONTINGENT FUND.

The President does not possess the power to order any portion of a specific appropriation for the mileage and pay of members of the House of Representatives to be transferred to the contingent fund of that body.

ATTORNEY GENERAL'S OFFICE,

April 8, 1839.

SIR: I have received yours of the 5th instant, in which, by direction of the President of the United States, my opinion is required as to the authority of the President to act upon the case presented by the Clerk of the House of Representatives.

I understand the case to be this: Congress, at its last session, appropriated a particular sum of money for the mileage and pay of the members of the House of Representatives; and also appropriated another sum, in gross, for the contingent expenses of the House. It now appears, from the letter of the Clerk of the House, that the contingent fund will be deficient about \$40,000; and therefore application is made to the President to transfer that amount from the specific appropriation for the mileage and pay of members, to the contingent fund of the House, to meet the demands upon that fund. The question presented for my opinion has no relation to the expediency of the measure; it is confined to its legality. I shall, therefore, in the investigation which I propose to give, confine myself entirely to an inquiry into the power of the President to do the act, or make the transfer asked for.

The constitution declares that "no money shall be drawn from the treasury but in consequence of appropriations made by law," &c. This I consider as an explicit inhibition upon the President and all others to draw from the treasury any portion of the public money, until Congress shall have directed it to be done; and the expression in the clause of the constitution just quoted, "but in consequence of appropriations made by law," clearly indicates that Congress shall also declare the uses to which the money to be drawn from the treasury is to be applied. The President, therefore, has no power, under the constitution, over the public treasure, except to apply it in the execution of the laws. Whenever he so applies it, he acts

Transfer of Specific Appropriations to Contingent Fund.

within his constitutional authority. Whenever he applies it without the directions of Congress expressed in some legislative act, or against such directions, he assumes upon himself power not conferred by the constitution. If Congress has appropriated money for one use or purpose, and has given no express power or discretion to the President to apply it to another, it seems to me that any act of his, transferring it to another use or purpose, would be wholly unauthorized by the constitution. And, surely, no assumption of power could be more dangerous than that of expending more money upon an object than Congress had appropriated for it; and to procure money for such a purpose from other appropriations, without authority of law, would be to derange the system of appropriations contemplated by the constitution, and be placing in the hands of the President, in effect, the appropriating power. Whether, in a case like that presented for my opinion, such authority exists, depends entirely upon the provisions which Congress has made on the subject. If it has not been conferred by any act of Congress, it does not exist; and the application made by the Clerk of the House of Representatives cannot be granted. That Congress has at all times taken this view of the constitution, will, I think, be manifest from the different acts referred to in this opinion.

The 1st section of the act of 3d March, 1809, "further to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments," which is relied on as authorizing this measure, contains the following provision:

"And the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other: *Provided, nevertheless,* That, during the recess of Congress, the President of the United States may, and he is hereby authorized, on the application of the Secretary of the proper department, and not otherwise, to direct (if in his opinion necessary for the public service) that a portion of the moneys appropriated for a particular branch of expenditure in that department be applied to another branch of expenditure in the same department; in which case, a special account of the

 Transfer of Specific Appropriations to Contingent Fund.

moneys thus transferred, and of their application, shall be laid before Congress during the first week of their next ensuing session."

This provision was confined to three executive departments of the government, to wit: the Treasury, War, and Navy Departments; and even in them great caution is used, lest a misapplication of the money appropriated might be made. There are very strong reasons why this power should be given by Congress to the President, in regard to appropriations made for these departments, which, no doubt, apply to the case under consideration. In carrying into effect, in the recess of Congress, the objects of the different appropriations, it would frequently happen that the estimates made would turn out, upon experiment, to be wholly erroneous, on account of a difference existing between the estimated and real prices of labor, provisions, and materials, &c., growing out of a change of circumstances in the affairs of the country which could not be foreseen. This could not ordinarily happen, in any material degree, in regard to the expenditures of the House of Representatives. Of them, a probable estimate could generally, if not always, be made, which would not vary far from the truth; the principal item being for printing, which is done under a contract fixing the price. I therefore cannot believe that this case comes within the reason of the act referred to; and, in my judgment, it is a clear case for the application of the maxim—*expressio unius est exclusio alterius*.

The act of March 3, 1817, supplementary to the act aforesaid, imposes a restriction upon the powers conferred upon the President, by the preceding act, and declares that nothing contained in that act "shall be construed to authorize the President of the United States to direct any sum appropriated to fortifications, arsenals, armories, custom-houses, docks, navy-yards, or buildings of any sort, or to munitions of war, or to the pay of the army or navy, to be applied to any other object of public expenditure."

This last provision was modified, so far as relates to the support of the military establishment; and, in that particular, the act of the 3d of March, 1809, was restored by the act of 16th

Transfer of Specific Appropriations to Contingent Fund.

of February, 1818, as to appropriations made prior to the 1st of January, 1817.

The act of the 3d of May, 1820, so far annuls the act of the 3d of March, 1809, as to authorize the President to direct a portion of the moneys appropriated for any of the following branches of expenditure in the military department, to wit: for the subsistence of the army, for forage, for the medical and hospital departments, and for the quartermaster's department, to be applied to any other of the above-mentioned branches of expenditure in the same department. And the President is authorized by said act to direct a portion of the moneys appropriated for any of the following branches of expenditure in the naval department, to wit: for provisions, for medicine and hospital stores, for repairs of vessels, and for clothing, to be applied to any other of the above-mentioned branches of expenditure in the same department; and that no transfers of appropriation from or to other branches of expenditure shall be thereafter made. And this act also repeals so much of the act of the 16th of February, 1818, as is above referred to.

The act of the 6th of April, 1838, making appropriations for the civil and diplomatic expenses of the government for the year 1838, confers the same power on the President, in relation to the transfer of funds appropriated for the Post Office Department, under one head of service, to any other branch of the public service in the said department, which he possessed under former laws, as to transfers in the other departments.

I have been thus particular in referring to the different acts of Congress upon this subject, not only for the purpose of showing the vigilance and caution which have been exercised by that body in guarding this power, (which, from necessity, in certain cases was conferred on the Executive,) from any possible abuse, but also for the purpose of showing that, where Congress deemed this authority of transfer necessary and proper, it has been conferred on the President expressly. But even in these cases, it is never to be exercised, except upon the application of a responsible head of an executive department, to whom is confided the execution of that branch of the public service. In this case, the application is made by the Clerk of the House of Representatives, who has not been directed by

 Extension of Patents for Inventions.

any law to make it; and the object is, the disposition of the money designed and provided by Congress for the accommodation and convenience of the members of the House, by Executive interference, without any law authorizing it.

I am aware of the existence of but one precedent in favor of the power of the President to make the transfer asked for. In the year 1824 a similar transfer was made, upon a failure of the contingent fund of the House of Representatives. Upon full consideration, I am unable to discover any legal sanction for the act, and am constrained to say that I do not think the case was well considered. The conclusion to which I have arrived is, that the President does not possess the power to act in the case now before me; and my convictions are too strong to permit me to advise him to follow a single precedent, which, in my judgment, was not warranted by law.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

EXTENSION OF PATENTS FOR INVENTIONS.

Extension of patents for useful inventions may be granted to the legal representatives of original patentees, where such patentees, if living, would be entitled thereto.

ATTORNEY GENERAL'S OFFICE,

April 9, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 6th instant, accompanied by a communication from the Commissioner of Patents, presenting the following question for my opinion: "Whether the legal representatives of an original patentee can obtain an extension of a patent in a case where the original patentee, if living, would be entitled to such extension upon his own application."

By the 5th section of the act of 4th of July, 1836, entitled "An act to promote the progress of useful arts, and to repeal all acts and parts of acts heretofore made for that purpose," it is provided that all patents issuing from the office of the Commissioner of Patents shall, in its terms, grant to the applicant or

Extension of Patents for Inventions.

applicants, his or their heirs, executors, administrators, or assigns, for a term not exceeding fourteen years, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery.

In section 10 of the same act it is further provided, that when any person hath made, or shall have made, any new invention, discovery, or improvement, on account of which a patent might, by virtue of this act, be granted, and such person shall die before any patent shall be granted therefor, the right of applying for and obtaining such patent shall devolve on the executor or administrator of such person, in trust for the heirs at-law of the deceased, if he shall have died intestate; but, if otherwise, then in trust for his devisees, in as full and ample manner, and under the same conditions, limitations, and restrictions, as the same was held, or might have been claimed or enjoyed, by such person in his or her lifetime.

The 18th section of the same act declares, that whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the Commissioner of the Patent Office, setting forth the grounds thereof, &c.

Upon a view of all these provisions, it is evident that Congress intended to afford to the author of every useful invention or discovery an opportunity to indemnify himself for his labor and expense in making such invention or discovery, by giving to him its exclusive use for a period of time which might answer that purpose; and provision is expressly made, in case of his death before his first application, that his executor or administrator may, upon application, obtain a patent for the benefit of his estate. Congress foresaw that cases would occur in which this indemnity would not be obtained within the fourteen years limited in the patent; therefore it is provided that an extension of the patent may be procured. Under such circumstances, I can see no reason why an executor or administrator should be permitted to obtain a patent in the first instance, which will not apply with equal force to the extension of a patent, upon a case being properly made out.

I am, therefore, of opinion that the board of commissioners created by the 18th section of the act above referred to have

Bidding at Land Sales.

jurisdiction, and may act upon the application of Henry Nyman, administrator of Ezra Slifer, and decide on the same, in the same manner as though the application had been made in the lifetime of the latter.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF STATE.

BIDDING AT LAND SALES.

Where a lot of land offered at auction at a public land sale was struck off to A, who advanced the money, and took a receipt therefor, and B, on the same day, offered evidence to prove that he nodded to the auctioneer, and that his nod was equivalent to a bid for said land above that of A, and that, thereupon, the land officers put up the land again on a subsequent day, and struck off the same to C, who conveyed it to B, who disputes A's title—HELD, that if B intended his nod at the first sale to be a bid above A, he should have promptly disclosed it at the time, and invoked the land officers to remedy the inobservance or neglect of the auctioneer; and that, as this was not done, the patent must issue to A, to whom it was struck off at the first sale.

ATTORNEY GENERAL'S OFFICE,

April 10, 1839.

SIR: I have had the honor to receive your communication referring to me, for my opinion thereon, the conflicting claims of Daniel Whitney and George McWilliams. The facts of the case appear to be these: On the 16th day of November, 1835, the sales of public lands commenced at Green Bay; and on that day the lot of land now in controversy was set up at auction, and struck off to Daniel Whitney. After the sale, and on the same day, Whitney paid for the land, and took the usual receipt. After this, but still on the same day, evidence was offered to the register and receiver to prove that James D. Doty had, during the sale, and before the lot in question was struck off to Whitney, nodded to the auctioneer; which nod was intended for a bid above that of Whitney, but was unperceived or disregarded by the auctioneer. Upon this evidence, the land officers determined again to offer the lot for sale at auction on the next day, notified Whitney of the fact, and offered to refund him his money. On the next day the land was accordingly offered again for sale, and struck off to George McWilliams, who assigned it to James D. Doty. In this state

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of the case, my opinion is asked as to which of these two sales should be avoided, and which confirmed.

This case does not require me to decide to what extent, and what kind of, errors or mistakes committed at the sales of public lands can be corrected elsewhere than at the General Land Office; nor does it require me to decide how far, and under what circumstances, the act of nodding is to be considered as a bid; nor am I required to say whether the act of striking the land off by an auctioneer, of itself, conclusively settles the question of sale. I am clearly of opinion, however, that the bid of James D. Doty in this case (if, indeed, it can be considered as a bid at all) was not made known as soon as, under the circumstances of the case, it might and ought to have been made known. When he made his bid, and saw that it was unobserved or disregarded, and heard the land cried upon the preceding bid, and ultimately struck off to another, the fact should have been promptly and openly disclosed at the moment, if at all, and the aid of the land officers been at once invoked to remedy the inobservance or neglect of the auctioneer. This does not appear to me to have been done with that promptitude which the case required. I am therefore of opinion that justice and policy require that the patent for the lot in controversy should be issued to Whitney.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

 COMPENSATION OF COLLECTORS OF CUSTOMS.

By the acquiescence of the government, and the construction given in several judicial decisions, entitled to respect, the act of the 7th of May, 1822, in relation to the compensation of officers of the customs, is not deemed to work a repeal of the act of the 2d of March, 1799, in relation to the same subject.

ATTORNEY GENERAL'S OFFICE,

April 11, 1839.

SIR: I have had the honor to receive your communication relative to the claim of Mr. Henshaw, late collector of the port of Boston, to certain fees and emoluments of office.

On the 2d of March, 1799, an act of Congress was approved, entitled "An act to establish the compensation of officers em-

Compensation to Collectors of Customs.

played in the collection of duties on imports and tonnage." The 4th section of this act provides "that, whenever a collector shall die or resign, the commissions to which he would have been entitled on the receipt of all duties bonded by him shall be equally divided between the collector resigning, or the legal representatives of such deceased collector, and his successor in office, whose duty it shall be to collect the same; and, for this purpose, all the official books, papers, and accounts of the collector resigning, or deceased, shall be delivered over to such successor."

On the 7th of May, 1822, another act of Congress relative to the same subject-matter was approved, entitled "An act further to establish the compensation of officers of the customs," &c. The seventh section of this act establishes a new rate of compensation in relation to various collectors; among which, was the collector of the port of Boston. And the ninth section provides, "that whenever the emoluments of any collector of the customs of either of the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, or New Orleans, shall exceed four thousand dollars in any one year, after deducting the necessary expenses incident to his office in the same year, the excess shall, in every such case, be paid into the treasury for the use of the United States."

The legal question presented for my consideration is, whether these provisions of the act of 1822 repeal the provision of the act of 1799, above referred to? If this were a new question, unaffected by the practice of the Treasury Department, or by judicial interpretation, my opinion would be in the affirmative; but the almost uniform usage of the department, under the law of 1822, is based upon an opposite construction of it. There are also some judicial decisions entitled to high respect, which seem to sanction the same view. Under these circumstances, my opinion is, that the department should continue its former practice until Congress shall act on the subject, and the law of 1822 be considered as not repealing the above-mentioned provision of the act of 1799.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

Distribution of Prize-Money.

DISTRIBUTION OF PRIZE-MONEY.

Distribution of certain moneys, appropriated by Congress as prize-money, among the officers and crew of two gun-boats, must be made in the proportions and to the persons pointed out by the general laws and regulations of the navy applicable to the subject.

ATTORNEY GENERAL'S OFFICE,

April 13, 1839.

SIR: I have the honor to acknowledge the receipt of your communication of yesterday, asking my opinion relative to the proper construction of the act of Congress approved the 3d of March last, providing for the distribution of five thousand four hundred and sixty-five dollars (\$5,465) of prize money among the officers and crew of two gun boats therein specified, as a reward for a gallant and praiseworthy act performed by said officers and crews during the year 1816. It will be observed that the act appropriating this money directs that it "shall be distributed as prize money," and does not direct specifically what proportion of it each officer and each one of the crews of said gun-boats shall receive. Under these circumstances, my opinion is that Congress intended that it should be distributed in the proportions and to the persons pointed out by the general laws and regulations of the navy applicable to the subject.

The act of Congress approved 23d of April, 1800, entitled "An act for the better government of the navy of the United States," contains the rules on this subject; and the first clause of the sixth section of that act provides that prize money shall be distributed as follows: "To the commanding officers of fleets, squadrons, or single ships, three-twentieths—of which, the commanding officer of the fleets or squadrons shall have one-twentieth, if the prize be taken by a ship or vessel acting under his command, and the commander of single ships two-twentieths; but where a prize is taken by a ship acting independently of such officer, the three-twentieths shall belong to the commander."

To my mind, these provisions of law are plain, and admit of no doubt in their application to this case. The commander of the squadron to which the two gun-boats above referred to were attached, is, under this law, clearly entitled to one-twentieth of the money appropriated by Congress; and he is the

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only individual in reference to whose claims in the premises you have expressed a doubt.

It is also to be observed, that the last clause of this same section of the act of April 23, 1800, (which is added to the section by way of modification or exception to the foregoing rule for distributing prize-money,) throws additional light upon its true meaning. This clause provides that "no commander of a fleet or squadron shall be entitled to receive any share of prizes taken by vessels not under his immediate command, nor of such prizes as may have been taken by ships or vessels intended to be placed under his command, before they have acted under his immediate orders; nor shall a commander of a fleet or squadron, leaving the station where he had the command, have any share in the prizes taken by ships left on such station, after he has gone out of the limits of his said command."

I repeat, therefore, that these provisions of law appear to me to be plain, and indicate very clearly the intention of Congress in relation to the commander of the squadron to which the two gun-boats referred to belonged, was, that he shall receive his due proportion of the money specially appropriated in this law, as in ordinary cases of prizes.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

BACK LAND PRE-EMPTIONS IN LOUISIANA.

Back pre-emptions cannot be lawfully claimed by those who were not owners of land on a river, creek, &c., at the time of the approval of the act of June 15, 1832; and individuals entitled to lands, but who had not located them at the date of said act, cannot be considered to have perfected a title to any specific lands so as to be regarded as owners within the meaning of the act.

The land in controversy in this case was not subject to pre-emption, for the reason that the claimant did not own the front lands in 1832.

ATTORNEY GENERAL'S OFFICE,

April 16, 1839.

SIR: I have had the honor to receive your communication relative to the claim of John Compton, assignee of Garrigues Flaujac.

Back Land Pre-emptions in Louisiana.

This claim is set up under the act of Congress approved June 15, 1832, entitled "An act to authorize the inhabitants of the State of Louisiana to enter the back lands;" and the act of Congress supplementary thereto, approved February 24, 1835.

The first clause of the first section of the act of June 15, 1832, is in the following words: "That every person who, either by virtue of a French or Spanish grant recognised by the laws of the United States, or under a claim confirmed by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the State of Louisiana, or by virtue of any title derived from the United States, owns a tract of land bordering on any river, creek, bayou, or water-course, in the said Territory, and not exceeding in depth forty arpens, (French measure,) shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpens (French measure) in depth, nor in quantity of land that which is contained in his own tract, at the same price, and on the same terms and conditions, as are or may be provided by law for the other public lands in the said State."

This provision of law clearly gave to those inhabitants of Louisiana who were, at the time of the approval of the act, owners of a tract of land situated on any river, creek, bayou, or water-course, and to those only, the right to enter an additional quantity in the rear thereof. The act does not apply to those who may become owners thereafter, nor to those who may have been owners of land before; but to those only who were owners of any tract of land, in the manner described by the act, at the time of its approval. Those persons who were entitled to the benefits of this act, were also required to make the entry within three years from the date thereof; which time was, however, by the supplemental act of February 24, 1835, extended to the 15th of June, 1836. This supplemental act was not intended to enlarge the benefits conferred by it, in any other respect than in point of time. The only remaining inquiry, therefore, is, was Compton or his assignee (Flaujac) the owner of a tract of land, as described in the act of June 15, 1832, at the date of its approval? I will proceed to answer this inquiry.

Back Land Pre-emption in Louisiana.

On the 20th of May, 1826, an act of Congress was approved, entitled "An act for the relief of Garrigues Flaujac, of Louisiana;" and the following is the whole of the act:

"Be it enacted, &c., That Garrigues Flaujac, of the county of Opelousas, in the State of Louisiana, or his legal representatives, are hereby authorized and empowered to locate a certain tract of land, derived from an order of survey in favor of Louis Berton de Antilly, for three thousand two hundred (3,200) superficial arpens of land, being forty arpens in front by forty arpens in depth, on both sides of bayou Grosse Tête, in Louisiana; and which said tract of land was confirmed by an act of Congress dated the 28th day of February, 1823, in conformity with the report of the register and receiver of the eastern land district of Louisiana; the said tract of land thus confirmed having been surveyed and sold by the United States: which location shall be made upon any of the unappropriated public lands in the southwestern district of Louisiana, south of the Red river: *Provided*, That the said location shall, as far as possible, be made in one body, and conform as nearly as practicable to the lines of the public surveys: *And provided, also*, That the said Garrigues Flaujac, or his legal representatives, before such location, shall release to the United States, in such manner as the Commissioner of the General Land Office shall direct, all his right, title, claim, and interest, in the land heretofore confirmed to him on the said bayou Grosse Tête; and the said release and location shall be made in one year from and after the passage of this act."

In this act is comprised a history of this claim, from its inception up to that date; and the supplemental act of May 1, 1834, still further extends the history. It is in the following words:

"That Garrigues Flaujac, of Louisiana, or his legal representatives, be, and they are hereby, authorized to locate the tract of land of three thousand two hundred arpens, described in the act to which this is supplementary, upon any of the unappropriated public lands in the southwestern district of lands south of Red river, in portions of not less than eight hundred superficial arpens, conforming, as nearly as practicable, to the lines of the public surveys: Provided, That, in addition to the

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release heretofore executed, the said Flaujac shall further, within one year from the passage of this act, release to the United States, in such form as the Commissioner of the General Land Office may direct, all right, title, and claim to or in any lands heretofore located pursuant to the act of which this is a supplement: *And provided, further,* That the new location herein authorized shall be made in one year from and after the passage of this act."

Pursuant to the provisions of this act, an entry was made of the tract in front of the one now claimed, and situated on Red river. This being done, the tract of land now claimed, and lying in the rear of that thus entered, was claimed as a *back* pre-emption, under the law of June 15, 1832, already referred to; and on the 24th of May, 1836, the land officers at Opelousas allowed this additional entry to be made under the law. This entry, however, the Commissioner of the General Land Office considered not warranted by the law, and refused to sanction it by any official act of his; and he asked your instruction on the point whether the said tract of land was subject to entry as a back pre-emption: which question is referred by you to me.

Upon a view of the foregoing facts, it appears clearly that, at the date of the act of June 15, 1832, the legislative grant made by Congress to Flaujac was unlocated; and could not, therefore, be considered as complete, in respect to this or any other particular tract or parcel of land. Flaujac was not, therefore, the owner of this particular tract, under the law of 1826 for his relief, at the date of the law of 1832; and could not be entitled to its benefits. Nor was he entitled to the benefits of this law under the supplemental act of 1835; which, as before stated, merely extended the time within which an entry might be made by a person entitled under the provision of the former act. Nor can I discover that the claimant has any right to the land in controversy, as an incident to an original Spanish title of which he is the assignee; for, if he might otherwise have had such a right, the laws referred to afford positive proof of its having been expressly relinquished by his assignor.

My opinion, therefore, is, that the land in controversy was not subject to pre-emption under the act of June 15, 1832, entitled "An act to authorize the inhabitants of the State of Lou-

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isiana to enter the back lands," nor under the provisions of the act supplemental thereto.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

LANDS SUBJECT TO PRE-EMPTION.

The right of pre-emption attaches only to such public lands as are subject to the operation of the general land system of the country, and not to those which have, by act of Congress, been taken out of the class of public lands and appropriated to specific objects, or reserved for particular purposes, as for the cultivation of the vine and olive.

ATTORNEY GENERAL'S OFFICE,

April 18, 1839.

SIR: I have had the honor to receive your communication of the 13th instant, relative to the claims of Doctor Glenn and others to enter lands under the pre-emption laws, in which my opinion is asked upon the legal questions involved in the said claims.

The main question involved, is, whether the land claimed is subject to entry under the pre-emption laws; or, on the contrary, has been reserved and taken out of the class of public lands, and consequently withdrawn from the operation of those laws? In accordance with the request contained in your letter, I shall proceed to answer this inquiry.

On the 3d of March, 1817, an act of Congress was approved, entitled "An act to set apart and dispose of certain public lands for the encouragement of the cultivation of the vine and olive." The title of this act very clearly explains its general nature and design. It was to appropriate a certain portion of the public domain for the encouragement of the cultivation of the vine and olive. In accordance with this general design of Congress, the body of the act provided that four contiguous townships of land, in a certain land district within the then Territory of Mississippi, (now the State of Alabama,) should be set apart from the class of public lands, and reserved from public and private sale, and devoted to the objects and purposes specified in the law. Pursuant to this law, four town-

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ships of land, including the land now claimed by Doctor Glenn and others under the pre-emption laws, were actually reserved; and that portion of the language of the law which makes the reservation, makes it without modification or limitation; and the reservation, being thus made indefinite and unlimited by the law, must necessarily have so continued ever since, unless some subsequent legislation of Congress has altered its nature and extent. The next inquiry, therefore, is, has any such legislation taken place?

I have carefully examined the various acts and supplements of acts of Congress, &c., professing to alter or amend the act of March 3, 1817, under which the original reservation was made, (namely, the acts approved April 26, 1822; February 19, 1831; February 19, 1833; and March 2, 1837;) and can discover in them no intention on the part of Congress to throw back into the class of public lands the four townships above referred to. Nor can I discover in either of the pre-emption laws any evidence warranting the conclusion that the national legislature designed that these lands should be subject to the operation of those laws. On the contrary, their provisions appear to me plainly to manifest an opposite intention on the part of the legislature; for all of these expressly provide that lands reserved by law shall not be subject to entry under their provisions. It is also a very strong, if not conclusive, consideration in favor of the same opinion, that it was no part of the general motive and intention of the legislature, in making the pre-emption laws, to throw back into the class of public lands, and subject to the operation of the general land system of the nation, those tracts which had been excepted and taken out of them by some special law, and for some special purpose. But the true design of those pre-emption laws was to give pre-emption rights to settlers upon those lands which undeniably belonged to the class of public lands, and were subject to the operation of the general land laws of the United States.

My opinion, therefore, is, that as those lands only are subject to the right of pre-emption which belong to the class of public lands, and which, but for the pre-emption laws, would be subject to the operation of the general land system of the country; and that, as Congress has excepted and taken the

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land in controversy out of the class of public lands, and has never manifested any intention on its part to replace them, or subject them to pre-emption entries,—the original reservation must be considered as still in force, and the four sections of land now in controversy as not subject to entry in the manner claimed by Doctor Glenn and others. Were anything further necessary on this subject, a conclusive argument as to the intention of Congress is furnished by the act of 2d of March, 1837; by the 2d section of which, it is expressly provided that any remainder of said four sections, not disposed of by the 1st section of this act, shall be subject to entry at one dollar and twenty five cents per acre, by the trustees of the Demopolis Female Academy, in trust for the use and benefit of said institution.

The first section of this act had made provision for those who held claims to portions of said four sections of land under the Tombigbee Association; and by the 2d section, a right to enter the whole residuum is vested in the Demopolis Female Academy, thereby excluding all other purchasers.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

THE WYANDOT RESERVE AT UPPER SANDUSKY.

The Wyandot nation of Indians have the authority to treat with the United States respecting the reservation of twelve miles square at and about Upper Sandusky, in the State of Ohio, as the supplement to the treaty of 1817 reinvested them with their title in trust.

ATTORNEY GENERAL'S OFFICE,

April 20, 1839.

SIR: I have had the honor to receive your communication relative to the authority of the Wyandot tribe of Indians to treat with the United States respecting the reservation of twelve miles square of land at and about Upper Sandusky, in the State of Ohio. On the 29th day of September, 1817, a treaty was made between the agents of the United States, on

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the one part, and the sachems, chiefs, and warriors of the Wyandot and other tribes of Indians, on the other part; by which a very large tract of country, including the reservation of twelve miles square above named, was ceded by the said Indians to the said United States.

The United States, however, by the sixth article of the same treaty, agreed on their part to grant the said twelve miles square, by patent in fee-simple, to certain chiefs named in the treaty, for the use and benefit of certain persons also named in a schedule annexed to and made a part of the treaty.

On the 17th of September, 1818, a treaty supplemental to the above was made, and the first section is in the following words: "It is agreed between the United States and the parties hereunto, that the several tracts of land described in the treaty to which this is supplementary, and agreed thereby to be granted by the United States to the chiefs of the respective tribes named therein, for the use of the individuals of the said tribes, and also the tract described in the 20th article of the said treaty, shall not be thus granted, but shall be excepted from the cession made by the said tribes to the United States, reserved for the use of the said Indians, and held by them in the same manner as Indian reservations have been heretofore held. But it is further agreed, that the tracts thus named shall be reserved for the use of the Indians named in the schedule to the said treaty, and held by them and their heirs forever, unless ceded to the United States."

This provision of the treaty very clearly restores the title to the reservation of land of twelve miles square at Upper Sandusky, to the same condition that it was in before it was ceded by the Indians to the United States at all—with this exception only: that it was restored to the Wyandot nation of Indians, in trust for the use of the individuals named in the schedule annexed to the treaty of 1817. My opinion, therefore, is that the Wyandot nation of Indians have the authority to treat with the United States respecting this reservation.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

Duties on Fabrics of Worsted or Combed Wool.

DUTIES ON FABRICS OF WORSTED OR COMBED WOOL.

The tariff act of 2d March, 1833, provides that all articles of manufacture which may be ascertained to be worsted shawls, worsted stuff goods, or composed of silk and worsted, shall be admitted free of duty.

ATTORNEY GENERAL'S OFFICE,
April 22, 1839.

SIR: I have the honor to acknowledge the receipt of your communication of the 12th instant, relative "to the bearing of the decision of the Supreme Court of the United States, in the case of Elliott *vs.* Swartwout, on manufactures of worsted or combed wool;" and now proceed to give such an answer as the case seems to demand.

I regret that Congress, whose attention was called to this subject by you at the last session, omitted to pass an act declaring plainly and distinctly the law upon this subject. In the present state of things, I can only say that the act of Congress upon the subject referred to, has been interpreted by the Supreme Court of the United States, in the case of Elliott *vs.* Swartwout, (reported in 10 Peters' U. S. Reports;) and the construction placed on the act of the 14th of July, 1832, by that tribunal, must be regarded and conformed to until Congress shall pass some additional act to change and explain the same.

The next inquiry, therefore, is, What does that decision establish? It establishes that the following expressions contained in the second clause of the second section of the act of July 14, 1832, viz: "worsted stuff goods, shawls, and other manufactures of silk and worsted," should be construed precisely as if the word *worsted* were inserted in the expression before the word *shawls*; in which case, the expression would read thus: "worsted stuff goods, worsted shawls, and other manufactures of silk and worsted;" and as this same expression contained in the act of 1832 is inserted in the act of 1833, the same interpretation must be placed on it there. My opinion is, therefore, that the decision of the Supreme Court referred to, establishes—

1. That all articles of manufacture, which shall be proved at the trial of any suit for duties to be worsted stuff goods, are free of duty, under the act of March 2, 1833.

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2. That all articles of manufacture, which shall be in like manner proved to be worsted shawls, are in like manner free of duty.

3. That all articles of manufacture, which shall in like manner be proved to be manufactures of silk and worsted, are also exempted from duty under the same act.

This, in my opinion, is the bearing that the decision of the Supreme Court in the case referred to has upon the subject of manufactures of worsted or combed wool.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

ACCOUNTS AND ACCOUNTING OFFICERS.

It is inexpedient for accounting officers in any case, unless thereunto specially directed by act of Congress, to re-adjudicate upon the items of an account once considered and settled in their offices.

If the practice be allowed, the experiment will be made upon every change of accounting officers, by persevering claimants who may imagine themselves entitled to more than they have been allowed, to procure a reconsideration and revision of former decisions; and the same would be likely to result disadvantageously to the government.

ATTORNEY GENERAL'S OFFICE,

April 24, 1839.

SIR: I have had the honor to receive your communication of the 26th of January last, relative to the claim of John McCalla, marshal of the district of Kentucky, to certain poundage fees or commissions on certain executions put into his hands to be executed, and which were afterwards stayed by the direction of the proper officers of the government.

This opinion would have been given sooner, had it not been for the pressure of other indispensable official duties.

In the letter of the First Comptroller, referred by you to me, my opinion is asked upon the two following questions:

1. "Is the claim of Mr. McCalla good in point of law?"

2. "If so, is it competent and proper for the present accounting officers to take up and reverse the decision of their predecessors in the special case under consideration, and under the peculiar circumstances attending it?"

Accounts and Accounting Officers.

I will answer this last inquiry first; because the opinion I entertain relative to that, will remove the necessity of considering the first.

It is undoubtedly a good general principle of law, as well as of expediency, not to say absolute necessity, that the accounting officers, as well as all other responsible executive officers, should, as far as possible, refrain from disturbing, unsettling, or reversing any of the official determinations of their predecessors; and if, in the observance and preservation of this wholesome general rule, injustice shall be done to any person, it will be far better for the aggrieved individual to seek redress at the hands of Congress, than to place the whole past transactions of the accounting officers in an unsettled condition. By which means, not only would great, and perhaps inextricable, confusion be introduced into the transactions of those officers, but, in the resettlement of accounts, might great injustice be done in many cases to individuals as well as to government. A serious question has been made, and sanctioned by at least one member of the Supreme Court, whether the accounting officers can in any case revise and readjudicate upon the items of an account once settled in these offices. I do not name this as intending to give my approval of all that was said by the judges in the case of *ex parte* Randolph, (2d Brockenbrough's Reports, page 447;) but in order to show that the necessity of preventing a re-examination of claims against the United States is felt and appreciated by members of another department of the government.

This claim of Marshal McCalla has been twice before the accounting officers of the government, and has, in both instances, been rejected. Its allowance is now urged for the third time; and it is apparent, if this practice be allowed, that, upon every change of accounting officers, the experiment will be made to procure a change of opinion by every persevering claimant who may imagine himself entitled to more than has been allowed him. And you will readily perceive that such a practice would always operate disadvantageously to the government, because, if the account be once allowed, the money would be paid, and thus the transaction be closed, and in very rare instances, if any, would a re-examination be had; whereas

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a vigilant claimant would seek every opportunity for a re-adjudication, until some fortunate occurrence, or favorable mode of thinking in the accounting officers, should take place, giving him the benefit of his claim. Therefore, without expressing any opinion upon the original merits or legality of Mr. McCalla's claim, I think it ought not to be allowed by the accounting officers.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

ALLOWANCE FOR EXTRA RATIONS FURNISHED UNITED STATES TROOPS IN MICHIGAN.

Where a contractor for certain specified rations for the army, to be delivered at a particular place, including a certain ration of distilled liquor, was, after the execution of his written contract, directed by the War Department to furnish an additional ration of liquor to the troops on fatigue duty—HELD, that he had the right to elect in respect to the price to furnish such ration under his contract, or to demand the fair market value thereof at the time and place, &c.

Where the district court has so found, and Congress has recognised and confirmed the principle, the accounting officers are required to do so likewise in their settlement of the account.

ATTORNEY GENERAL'S OFFICE,

May 15, 1839.

SIR: I have had the honor to receive your communication of the 8th instant, which is as follows:

"On the 26th of January, 1816, a contract was entered into between the Secretary of War and James Thomas, by which the latter bound himself, at prices stipulated in the contract, to supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him for the use of the United States, at all and every place and places where troops are or may be stationed, marched, or recruited, within the limits of the Michigan Territory, the vicinity of the upper lakes, and in the State of Ohio; thirty days' notice to be given of the post or place where rations may be wanted, or the number of troops to be furnished on their march from the 1st day of June, 1816, to the 31st day of May, 1817.

"The articles of which the rations were to consist are shown

Allowance for Extra Rations furnished U. S. Troops.

by the following provision of the contract: '*Second*, That the ration to be furnished and delivered by virtue of this contract shall consist of the following articles, to wit: one pound and a quarter of beef, or three quarters of a pound of salted pork; eighteen ounces of bread or flour; one gill of rum, whiskey, or brandy; and at the rate of two quarts of salt, four quarts of vinegar, four pounds of soap, and one pound and a half of candles, to every one hundred rations.'

"In September, 1816, a regulation was issued by the department, allowing to troops on fatigue duty an extra gill of liquor to every ration. For this extra gill of liquor, so far as supplied by Colonel Thomas, he has been allowed the price or prices stipulated in the contract for the other gill. With this, however, he is not satisfied. He contends, though bound by the contract to supply all the rations required of him for the troops, that the contract stipulated that the rations were to consist of certain portions of articles; that these portions could not legally be changed by any subsequent regulation; and that the extra gill of liquor was, therefore, so much beyond the portion of that article stipulated by the contract for a ration, and, consequently, not embraced by the contract; and he therefore demands that there shall be allowed to him, for the quantity in which he supplied this extra gill, not the price or prices fixed by the contract for the other gill, but the fair market price of the article in the vicinity where, and the time when, the different supplies of it were made. On the point thus contended for by Mr. Thomas, I beg leave to ask your opinion; and that you may fully see the question in its various aspects, I herewith transmit the papers in the case, which I respectfully request may be returned with your opinion."

It appears that, under the contract referred to, Mr. Thomas took upon himself the duties of a contractor; and while in the discharge of his duties as such, he was directed by the War Department to furnish one gill of whiskey in addition to the ration as described in the contract, to troops on *fatigue duty*. To this requisition it does not appear that he made any objection; nor did he declare, at the time, he would claim therefor a price over and above that stipulated to be paid for the same article when furnished agreeably to the terms of the contract.

Allowance for Extra Rations furnished U. S. Troops.

Were this the whole of the case, I should be strongly inclined to the opinion that his compliance with the requisition of the department, without notice of an intention to demand a higher price than that which by his contract he had agreed to receive for the same article, amounted to an implied contract to furnish the extra quantity at the same price. But the opinion of the district court of New York is otherwise. That court, in giving a construction to this very contract, decided that "the jury might legally allow to the defendant (Thomas) for all rations issued or deposited by him, and on the requisition of the government over and beyond the quantity he was bound to furnish by his contract, the market value of such supplies at the time and place they were furnished; for it would rest in the option of the defendant, (Thomas,) and not the government, in such circumstances, to consider the supply as furnished under the contract and at the contract price, or to claim the real value."

Congress, by an act approved July 2, 1836, recognised and confirmed the principle of this decision, so far as applicable to the present case, by requiring it to be carried into execution. The act referred to is entitled "An act for the relief of James Thomas," and is in the following words:

"Be it enacted, &c., That the proper accounting officers of the Treasury Department be, and they are hereby, authorized and directed to adjust and settle the accounts between the United States and James Thomas upon principles of equity and justice; and that, in the settlement of his accounts as contractor, the said accounting officers be required to recognise the judicial decision of the district court of the United States for the southern district of New York, as settling the true construction of the contract, and the relative rights of the parties under the same; and if upon such settlement there shall appear to be a balance due to said James Thomas, that the same be paid out of any money in the treasury not otherwise appropriated."

This act of Congress is plain and positive, and requires that Colonel Thomas should be allowed the real value or market price of all articles furnished by him, pursuant to the requisitions of the War Department, and which were not specifically required to be furnished at a fixed price by the terms of the

The Civil not Subordinate to Military Authority.

contract. I am, therefore, of opinion that the fair market value of the additional quantity of whiskey furnished for soldiers on fatigue duty should be allowed to the contractor.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

THE CIVIL NOT SUBORDINATE TO MILITARY AUTHORITY.

It is wholly inadmissible under our government to place the military above the civil authority; and, therefore, whilst the latter shall have the custody of an officer of the navy for the purpose of trying and punishing him for a homicide, he cannot legally be made amenable to a court-martial.

ATTORNEY GENERAL'S OFFICE,

May 15, 1839.

SIR: I have received your communication of this day, in which you submit for my opinion thereon the following question:

“Whether an officer of the navy can legally and properly be made amenable to a court martial for an offence, while a prosecution is pending against him before a court of criminal jurisdiction for the same offence?”

I presume this inquiry is made in reference to the case of homicide named by you to me a few days since, in which an indictment has been found, and the party has been arrested, and the case has not yet been tried. I can feel no hesitation in saying that, until he shall be discharged from the prosecution now pending before the civil tribunal, no court-martial can be held upon him. He is now in confinement or the custody of the sureties for his appearance before that court in which the indictment was found, and no step should be taken by your department calculated in the slightest degree to prevent the execution of the laws of the State, which are charged to have been infringed by the homicide, for which he has been indicted. Any such interference would be to place the military above the civil authority, which is wholly inadmissible in our government. You will readily perceive the collision which would necessarily grow up between the federal and State au-

 Certain Misnomers in Choctaw Treaty Unimportant.

thorities, were such a proceeding allowed, as holding a court-martial upon an officer when he was at the same time under a prosecution, not terminated, before a court of criminal jurisdiction in one of the States.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

CERTAIN MISNOMERS IN CHOCTAW TREATY UNIMPORTANT.

An assignment by P. P. Pitchlynn of a reservation in the treaty in favor of Peter Pitchlynn, where there is no doubt of the identity of the person, is good; as the law knows of but one christian name.

A patent for land may issue to John McGilvry as the head of a family registered by the name of John McGilvery, where there is no doubt of the identity of the person; as the orthography and sound do not vary so materially as to affect the grant.

ATTORNEY GENERAL'S OFFICE,

May 17, 1839.

SIR: I have the honor to acknowledge the receipt of yours of this morning, in which you say some difficulties exist as to the course you should pursue in the following cases. In the treaty made with the Choctaws, there is a reservation made in favor of *Peter Pitchlynn*; and a title bond is produced by a purchaser, which is signed by *P. P. Pitchlynn*. You further say you have no reason to doubt the identity of the person. The law knows but one christian name, and the omission of one or more initials between the christian and surname will have no effect in rendering any proceeding defective in point of law. (Vide 2 Cowen's Reports, 463; 3 Peters, 7.)

In all cases like the present, the true question is, what individual was intended to be benefited by the reservation? When that is ascertained beyond doubt, no further inquiry need be made. The name of an individual is given to him, and he is called by it, for the purpose of distinguishing him from others; the second christian name is generally not known, except to his immediate acquaintances; because he is commonly called by his first or one christian name. And I can see no reason why a reference should be made to Congress on this subject,

PENSIONS TO WIDOWS OF SURGEONS IN THE NAVY.

provided it be clearly proved that P. P. Pitchlynn is the person or individual designated in the treaty by the name of Peter Pitchlynn.

The other case put by you for my opinion in this:

It appears that a Choctaw head of a family was registered by the agent by the name of *John McGilvery*; a patent is now applied for by the name of John McGilvry—no doubt existing as to the identity of the person. I entertain no doubt as to the propriety of issuing the patent as asked for. The general rule of law upon this subject is, if the real name and the surname adopted be *idem sonans*, although differing in orthography, it will not be a misnomer; in this case, the sound and spelling do not vary materially—not more than would frequently occur when a citizen of the United States undertakes to spell the name of an Indian. The inquiry in this case should be the same as in the preceding one: is the person applying for the grant the same individual who applied to the agent to be registered? If that fact is established, nothing remains but to issue the grant.

I can see nothing in the opinion of Mr. Taney, when Attorney General, conflicting with the one now given. In that case, and in the case to which he refers, the names were not only dissimilar in orthography and sound, but were in fact generally known as distinct and different names.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

PENSIONS TO WIDOWS OF SURGEONS IN THE NAVY.

The widow of a surgeon in the navy who was commissioned in 1811, resigned in 1824, reappointed in 1827, and who died in the service in 1832, is entitled, in respect to the time which is to determine its amount, to a pension only under the last appointment.

ATTORNEY GENERAL'S OFFICE,
June 1, 1839.

SIR: I have had the honor to receive your communication of yesterday, relative to the pension which should be allowed to the widow of Doctor James Page, late a surgeon in the navy of the United States.

It appears that he was commissioned as a surgeon in the navy in 1811; that he resigned in 1824; was reappointed in 1827; and died in the naval service in 1832.

His widow now claims a pension as having been the wife of a surgeon of more than twenty years' standing in the navy. My opinion is, that she is not entitled to a pension upon the principle set up by her. The two commissions, and the service under them, cannot be united for the purpose of justifying a claim for the amount claimed by the petitioner. When he resigned his first commission, he became a private citizen; and had he died before his second appointment, his widow would have been entitled to no pension whatever; and it is only by virtue of his second commission that she is entitled to a pension at all; and, in my judgment, the law will not warrant the taking into view his services under the first commission in computing the time which is to determine the amount of the pension of his widow. Therefore, it seems to me she is entitled to a pension as the widow of a surgeon who was commissioned in 1827 and died in 1832.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

PRINTING FOR THE TREASURY DEPARTMENT.

The person entitled to the printing of the Treasury Department, generally, under the late biddings, should execute all the printing required by it, whether on paper or parchment, notwithstanding the error of the clerk in erroneously stating to the bidder for parchment that his bid for the printing of it was accepted.

NASHVILLE, July 17, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 8th instant, enclosing a statement of facts, upon which my opinion is asked in relation to certain questions which have arisen under the act of the 3d of March last, requiring the printing, stationery, and binding necessary for each of the executive departments to be furnished by contract, and that proposals for the same be advertised for.

Printing for the Treasury Department.

The main design of Congress, it seems to me, cannot be misunderstood. The language employed is clear and explicit; and the advertisement inviting proposals to be made *separately* for printing, stationery, and binding, was well calculated to carry the law into effect. I cannot discover, from any language in the act, an intention on the part of Congress to employ more than one printer for any one executive department of the government. We are not at liberty to presume that Congress intended, in the execution of the law, that the lowest possible sum for which any portion of the printing could be obtained should be given in every instance; on the contrary, a fair price for the whole of the printing of a department was evidently in the contemplation of Congress; and the true mode of ascertaining what bid should be accepted would be to take the aggregate of each proposal, and compare it with the other bids, and in that way ascertain which bid (taking all the printing together) was lowest. It might happen that a printer would not undertake to execute a particular job of printing at a certain price; but, if united with another job at a given price, he might be willing to execute it. It is but just to every bidder to take his bid and every part of it together, and either accept or reject the whole. I cannot perceive any authority, even in the head of a department, after the biddings are closed, to withdraw any particular item from the influence of a bid including it, when that bid is lowest, and made in conformity to the law and the advertisement, and accepted by the department. Entertaining the views I have expressed, I am necessarily brought to the conclusion that the person entitled to the printing of the Treasury Department, generally, under the late biddings, should execute all the printing required by the department, whether on paper or parchment, unless something can be found in the case to take it out of the operation of the principle laid down.

The reception of separate bids for parchment alone, although that article might be well embraced in the term *stationery*, could not be considered as including the printing to be done upon the parchment, any more than a bid to furnish paper would entitle the bidder to the printing to be executed on it. I therefore do not attach any importance to the circumstance just named.

The President and the Judiciary—Payment to Winnebagoes.

It appears from your communication that, from misapprehension of the clerk attending to the "business, in supposing that the *verbal* permission for bids alone for the parchment was intended to include the printing of it, the lowest bidder for the parchment was informed that his bid for the printing of it was accepted."

This error of the clerk (for such it certainly was) can have no legal effect upon the question now before me. The law and advertisements had both directed bids to be made separately for stationery, printing, and binding; nor was there any authority to detach a particular job from the great mass of printing to be executed for the department. Upon the whole, I am unable to perceive any reason which, in law, would justify the department in causing the printing upon the parchment to be executed by any others than the general printers for the Treasury Department.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

THE PRESIDENT AND THE JUDICIARY—PAYMENT TO WINNEBAGOES.

The judiciary cannot arrest the execution of a treaty by stopping the money designed to be paid under it, in the hands of the agents of the Executive. The treaty with the Winnebagoes provided that certain payments therein stipulated to be made should be made by the President of the United States, and with which the judiciary cannot rightfully interfere; and the agents appointed by the President may proceed to make the payments, in disregard of any writs of injunction which the judiciary may allow.

ATTORNEY GENERAL'S OFFICE,

September 7, 1839.

SIR: I have the honor to acknowledge the receipt of yours of yesterday, asking my opinion upon two points suggested by the Commissioner of Indian Affairs in his letter of the 5th instant. The first point relates to the duty of the government in making payments to the Indians of mixed blood, under the following provision in the treaty of the 1st of November, 1837, with the Winnebago nation of Indians, to wit: "2d. To pay,

The President and the Judiciary—Payment to Winnebagoes.

under the direction of the President, to the relations and friends of said Indians, having not less than one quarter of Winnebago blood, one hundred thousand dollars."

This is a treaty stipulation—at least it is so to be considered and acted upon according to the practice of the government; and the payment is to be made under the direction of the President of the United States. The parties to the treaty have agreed that the President, and no other individual, (unless acting under his authority,) nor any other branch of the government, shall make the payment, or interfere in the making of it. The payment is to be the act of the President, performed necessarily by agents of his own selection. Should the judiciary attempt, by injunction or otherwise, to prevent the agents of the Executive from making the payment according to the directions of the President, it would, in my opinion, be a gross usurpation on the part of the judiciary, and such an act as ought not to be supposed likely to occur. It appears that the proceedings under the first commission created under this part of the treaty have been set aside, and another commission or agency raised for the purpose of carrying this provision of the treaty into effect. This the President had the power to do, if, in his judgment, the justice of the case required it; nor can the decision of the President in that particular be revised or reversed by the judiciary. Besides, to admit that the judiciary can arrest the execution of a treaty, by stopping the money designed for such purpose in the hands of the agents of the Executive, who are employed merely to hand it over to the persons entitled, would be, in effect, to subject the government of the United States to the suit or action of any claimant who might believe himself entitled to any portion of the money. A principle which would lead to consequences so illegal, and so destructive to the regular and harmonious operations of the government, cannot be admitted.

As to the second point—"whether, if such a writ [injunction] should be issued, the agents of the government should withhold payment under it, until the final decree of the court was made; or proceed with the payment, according to the awards of the commission?"

I am clearly of opinion that, should such writ of injunction

Extra Compensation of Messengers and Watchmen.

be granted, the agents should proceed to make the payments, notwithstanding such writ. The treaty makes it the duty of the President to make the payment; in this, there can be no doubt. The treaty can only be fulfilled by making it; and, in my judgment, no court has the power to interpose its order to prevent it.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

EXTRA COMPENSATION OF MESSENGERS AND WATCHMEN.

The chief messenger in the Treasury Department is not entitled to compensation over and above his salary, for carrying the mails of the several offices occupying the southeast executive building, to and from the post office; but, if he be required to furnish a horse for that duty, a reasonable compensation for that should be allowed.

Nor are watchmen entitled to extra compensation for labor performed in the offices during the day.

All such claims for compensation come within the prohibitions of the 3d section of the act of Congress of the 3d March, 1839; upon which the views of the Attorney General were given in his opinion of 4th April last.

ATTORNEY GENERAL'S OFFICE,

September 9, 1839.

SIR: I have the honor to acknowledge the receipt of the following communication from you, dated the 28th ultimo:

"I have the honor to request your opinion on the questions arising on the following cases: The chief messenger in my office, whose salary as such has from time to time been fixed by the general civil appropriation acts of Congress, has also performed the duty of carrying the mails to and from the post office, of the several offices occupying the southeast executive building, and for which services he received a compensation of \$250 per annum. To perform this service, he was required to furnish a horse at his own expense.

"This expense of \$250 per annum has always been considered as one of the contingencies of the building, and has been paid out of the appropriation therefor.

"As it is doubtful whether this latter duty could be performed by the messenger, and paid for out of the appropriation, in

Extra Compensation of Messengers and Watchmen.

consequence. of the restrictions in the 3d section of the act of the 3d of March last, your opinion is requested on the point.

"Again: one of the watchmen, whose duty is to guard the building at night, and for whose compensation a special appropriation is annually made, is during the day employed in one of the offices of the department as a laborer, and is paid for his services as such, out of the contingent fund of that office. Is such employment and payment prohibited by the section of the act referred to?

"In both of these cases, the items on which the amount of the several contingent appropriations was computed, embraced carrying the mail and labor, but neither of them is specifically named in the appropriation bill."

The first case presented by this communication is an allowance of two hundred and fifty dollars to the chief messenger of your department for bringing and carrying letters and papers to and from the city post office. In the first place, I cannot perceive any reason why this service should not be considered as a portion of the services for which a salary is allowed by law to the chief messenger of your office.

I further consider that this claim for compensation comes clearly within the prohibition contained in the 3d section of the act of Congress of March 3d last, making appropriations for the civil and diplomatic expenses of the government for the present year.

As to the hire of a horse, if one be necessary for the purpose, a reasonable compensation should be made.

As to the second case—that of the watchman, who is also employed as a laborer in one of the offices during the day: I would remark, that, however proper it might be to except this and similar cases from the operation of the law, still Congress must make the exception; for I do not consider myself at liberty, where Congress has used strong and comprehensive language, to except cases which might not have been considered proper exceptions by that body, had their opinion been taken distinctly upon them.

In conclusion, I beg leave to refer you to the opinion of this office of the 4th April, 1839, as containing views relative to the

Guaranties for Transporting the Mails.

construction of the 3d section of the act above referred to, from which I feel no disposition to depart.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

GUARANTIES FOR TRANSPORTING THE MAILS.

Guaranties in the form prescribed by the department, but executed with the time prior to which the contract is to be executed left in blank, is not a legal compliance with the law requiring guaranties to be made.

ATTORNEY GENERAL'S OFFICE,

September, 10, 1839.

SIR: I have the honor to acknowledge the receipt of the following communication of yesterday's date:

"I am under the necessity of troubling you for an opinion upon the following point, viz:

"The 27th section of the post office law of 1836 is as follows, viz: '*And be it further enacted*, That every proposal for the transportation of the mail shall be accompanied by written guaranty, signed by one or more responsible persons, to the effect that he or they undertake that the bidder or bidders will, if his or their bid be accepted, enter into an obligation, in such time as may be prescribed by the Postmaster General, with good and sufficient sureties, to perform the service proposed. No proposal shall be considered, unless accompanied by such guaranty. If, after the acceptance of a proposal, and notification thereof to the bidder or bidders, he or they shall fail to enter into an obligation within the time prescribed by the Postmaster General, with good and sufficient sureties for the performance of the service, then the Postmaster General shall proceed to contract with some other person or persons for the performance of the said service; and shall forthwith cause the difference between the amount contained in the proposal so guarantied, and the amount for which he may have contracted for the performance of said service, for the whole period of the proposal, to be charged up against the said bidder or bidders, and his or their guarantor or guarantors; and the same may be

Guaranties for Transporting the Mails.

immediately recovered by the United States for the use of the Post Office Department, in an action of debt against either or all of the said persons.'

"In a recent advertisement for mail proposals, the department prescribed a form of the guaranty as follows, viz:

"The undersigned guaranty that , if his bid for carrying the mail from to be accepted by the Postmaster General, shall enter into an obligation prior to the day of March next, with good and sufficient sureties, to perform the service proposed.

"Dated 1839.'

"Accompanying a regular proposal, a guaranty in the following form was received, viz:

"The undersigned, John Gordon and Washington Rice, guaranty that Jesse Sharp and James Murdick, if their bid or bids for carrying the mail for any contract they may offer, should be accepted by the Postmaster General, shall enter into an obligation prior to , with good and sufficient sureties to perform the service proposed.

'JOHN GORDON,
'WASHINGTON RICE.

"WASHINGTON, *August 20, 1839.*'

"You will perceive that the time prior to which the contract is to be executed is left blank in this guaranty.

"Is this omission fatal to the guaranty? Or could an action be maintained against the guarantor, in case of the delinquency of the bidder, notwithstanding this omission?"

My opinion is, that the guaranty in question is not a compliance with the law requiring a guaranty to be made; and, of course, the bid or proposal to which it was intended to apply should be disregarded, as though no guaranty had been offered.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the POSTMASTER GENERAL.

Pensions to Widows of Revolutionary Soldiers.

PENSIONS TO WIDOWS OF REVOLUTIONARY SOLDIERS.

The act of March 3, 1837, and the joint resolution of July 7, 1838, have so far modified the act of 1836, that widows of revolutionary soldiers, who, having remarried, are again widows, irrespective of the date of the death of the second husband, or whether the second husband were a revolutionary soldier or not, are entitled to half-pay; provided said widows are otherwise entitled to the same.

ATTORNEY GENERAL'S OFFICE,

October 2, 1839.

SIR: In answer to yours of the 26th ultimo, I will remark, that I have examined the different acts of Congress in relation to the pensions provided by law for the widows of the officers and soldiers of the Revolution; and the following construction of them seems to be most consonant with the principles of law, and the intention of Congress in passing them.

The 3d section of the act of 1836 is as follows: "That any person who served in the war of the Revolution, in the manner specified in the act passed the 7th day of June, 1832, entitled 'An act supplementary to the act for the relief of certain surviving officers and soldiers of the Revolution,' have died, leaving a widow whose marriage took place before the expiration of the last period of his service, such widow shall be entitled to receive, during the time she may remain unmarried, the annuity or pension which might have been allowed to her husband, by virtue of the act aforesaid, if living at the time it was passed."

This act gave the pension of the revolutionary officer or soldier to the widow; but her second marriage barred the claim, it being the intention of Congress only to provide for her while she remained the widow of the officer or soldier.

On the 3d of March, 1837, Congress made the following provision: "That the benefits of the third section of the act entitled 'An act granting half pay to widows and orphans where their husbands and fathers have died of wounds received in the military service of the United States, and for other purposes,' approved the 4th day of July, 1836, shall not be withheld from any widow, in consequence of her having married after the decease of the husband for whose services she may claim to be

Pensions to Widows of Revolutionary Soldiers.

allowed a pension or annuity under said act: *Provided*, That she was a widow at the time it was passed."

This annuls the disability to claim produced by the second marriage, which existed under the former law; still, to entitle the claimant to the benefit of its provision, she must have been a widow on the 4th of July, 1836.

On the 7th July, 1838, the following joint resolution, which had passed both Houses of Congress, was approved by the President of the United States: "*Resolved by the Senate and House of Representatives of the United States in Congress assembled*, That the benefits of the third section of an act entitled 'An act granting half-pay to widows or orphans, where their husbands and fathers have died of wounds received in the military service of the United States, in certain cases, and for other purposes,' approved the 4th day of July, 1836, shall not be withheld from any widow whose husband has died since the passage of the said act, or who shall hereafter die, if said widow shall otherwise be entitled to the same."

In placing a construction upon this resolution, and deciding upon the class of individuals to be embraced by it, reference should be had to the law as it stood when this resolution was adopted. The wife of the officer or soldier was provided for by the act of 1836, if he had died before the passage of the law, and she remained a widow at the passage of the act.

Also, by the act of 1837, those widows were provided for who had married again, provided the second husband had died before the passage of the act.

The resolution was then passed, which repeals or annuls all former restrictions as to the time of the death of the husband; and the only doubt which can be raised is, whether the death of the husband referred to in the resolution is to be confined to the revolutionary officer or soldier, or any other husband to whom the widow of the officer or soldier may have been married after the decease of the former husband, who was an officer or soldier of the Revolution?

As the act of 1837 had removed the objection to the second marriage, and allowed the pension to the widow, although she had married again, provided she was a widow on the 4th of July, 1836; and as the resolution removes the impediments as

Expenses of Repairs and Supplies for Coast Survey.

to the time of the death of the husband—I think a just construction of the resolution, when taken in connexion with the former acts, will embrace the widows of revolutionary officers and soldiers who married the second time, whenever they shall again become widows.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

EXPENSES OF REPAIRS AND SUPPLIES FOR COAST SURVEY.

The costs of repairs and supplies furnished to certain vessels employed by the President in prosecuting the coast survey, must fall upon the appropriation made by Congress for the survey of the coast.

Yet, if vessels are detailed from the navy or from the revenue service for temporary service in the coast survey, they may be repaired from funds provided by Congress for the branch of the public service to which such vessels properly belong.

ATTORNEY GENERAL'S OFFICE,

October 12, 1839.

SIR: I have the honor to acknowledge the receipt of your communication referring to this office, by direction of the President, the inquiry whether the cost of repairs and supplies furnished to certain vessels in the coast survey, and which have been purchased for that special purpose, is properly chargeable upon the naval appropriation, or upon the appropriation for the coast survey?

In answering this inquiry, I will remark, that as there is a navy of the United States in existence, consisting of a considerable number of vessels, for which repairs and supplies are from time to time required; and as there is an annual appropriation, founded upon estimates of the Navy Department, made by Congress, for the support and maintenance of the navy,—the fund thus appropriated for this particular object cannot be expended on other objects, or for other purposes, unless Congress shall have authorized it to be done.

The vessels referred to form no part of the navy of the United States; they are not under the direction and control of the Secretary of the Navy, and, of course, their repairs and sup-

Expenses of Repairs and Supplies for Coast Survey.

plies were not included in his estimate laid before Congress, and are not, therefore, embraced in that appropriation. As to the vessels which belong to and form a part of the navy, and which may be employed in the coast survey,—these, constituting a part of the navy of the United States, are included in the estimate and appropriation, and their repairs and supplies are properly chargeable upon the navy fund.

As to the vessels belonging to the revenue-cutter service,—these are under the immediate direction and control of the Secretary of the Treasury; they are supported out of the accruing revenue; and when they, or any part of them, are engaged in the coast survey, their repairs and supplies are furnished in the same manner as though they were employed in the discharge of their ordinary duties. This is proper; because they are liable to be withdrawn from the coast survey whenever, in the opinion of the Secretary of the Treasury, the revenue service may require it. Still, it would not be proper to support the vessels which exclusively belong to the coast survey in the same way, because there is no law authorizing it, as there is in the case of the revenue cutters.

Unless there be something in the acts of Congress authorizing and directing the coast survey, which will change the foregoing view of the subject, the expense of repairing and supplying the vessels referred to must fall upon the appropriation made by Congress for the survey of the coast, as there is no other appropriation from which it can be taken.

The act of the 10th of February, 1807, entitled "An act to provide for surveying the coasts of the United States," authorizes no such diversion of the funds appropriated for the naval service, or any other service. The 3d section of that act, which is the only part of it which has any relation to the subject, only authorizes the President "to employ such of the public vessels in actual service as he may judge expedient in forwarding the survey of the coast." This authority necessarily carries with it the further power to keep those vessels in such a condition, both as to repairs and supplies, as will render them useful in accomplishing the object which Congress had in view in regard to the coast survey; but this must be done out of the funds provided by Congress for that branch of the public service to

 Contingent Expenses of Pension Agents.

which such vessels properly belong. In fact, Congress had at that very session, and has at every session since, provided for the repairs and supplies of all the vessels belonging to the navy in actual service, whatever their particular employment might be. But I cannot discover in the act any authority to apply any portion of the navy appropriation for the repairs and supplies of vessels not belonging to the navy, nor under the control of the head of that department.

The act of the 10th of July, 1832, entitled "An act to carry into effect the act to provide for a survey of the coast of the United States," only revives the act of the 10th of February, 1807, and can have no effect upon its construction. My opinion upon the whole subject is, that the cost of repairs and supplies of the vessels specially provided for the coast survey cannot be taken from the navy appropriation for the coast survey. I am aware that apprehensions are entertained that the progress of the coast survey may be impeded, unless means to carry it on can be supplied from some other fund than the coast survey appropriation. This evil, if likely to occur, would not change the law; and Congress can prevent it by its early action on the subject.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF THE TREASURY.

 CONTINGENT EXPENSES OF PENSION AGENTS.

Agents for paying pensions are entitled to have their necessary contingent expenses allowed, notwithstanding the act of April 20, 1836; as the prohibitions of that act may be well satisfied by stopping payment of the two per centum commissions which had been theretofore allowed for disbursing pension moneys.

ATTORNEY GENERAL'S OFFICE,

October 12, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 9th instant, enclosing a letter from the Commissioner of Pensions, stating two cases upon which my opinion is asked.

1. Robert King, pension agent at Knoxville, Tennessee, charges for stationery, printing blanks, &c., for the use of the

Contingent Expenses of Pension Agents.

agency, the sum of \$333 75, from June, 1834, to May, 1838, inclusive; in support of which, he has produced the necessary vouchers.

2. B. M. Lowe, pension agent at Huntsville, Alabama, charges for the transportation of \$9,000 in specie from Pontotoc, in Mississippi, to Huntsville, Alabama, the sum of \$75; and \$37, the amount of discount on a Treasury warrant on Pontotoc for \$3,137. These accounts (except the last item in Mr. Lowe's account, which requires some explanation) the Commissioner of Pensions, in his letter, says are no doubt correct; and according to the former practice in such cases, would be paid. The question arising upon these facts, and presented for my opinion, is, whether the act of Congress approved the 20th of April, 1836, entitled "An act to prescribe the mode of paying pensions heretofore granted by the United States," forbids the payment of these claims?

The act upon which this question arises is in the following words: "That all laws and parts of laws authorizing or requiring the Bank of the United States or its branches to pay any pensions granted under the authority of the United States, shall be, and the same are hereby, repealed; and such payments shall be hereafter made at such times and places, by such persons or corporations, and under such regulations, as the Secretary of War may direct; but no compensation or allowance shall be made to such persons or corporations for making such payments, without authority of law."

In order to determine the proper construction of this act, it will be necessary to recur to those circumstances in which it had its origin.

It appears that, prior to the establishment of the Bank of the United States in 1817, the pensioners were paid by the commissioners of loans, who received two per centum on all sums disbursed by them. After the establishment of the Bank of the United States, the pensioners were paid, without charge to the United States, by that bank and its branches, except in places where no branches had been established; and in those places the agents were allowed two per centum on all sums disbursed; and their accounts were paid for contingent expenses, such as stationery, printing, transportation of specie, &c.

Contingent Expenses of Pension Agents.

Such was the usage warranted by law, when Congress passed the act of April 20, 1836. This act dispenses with the agency of the Bank of the United States, and provides "that the Secretary of War shall thereafter make the payments by such persons or corporations, and under such regulations, as he may direct; but no compensation or allowance shall be made to such persons or corporations for making such payments, without authority of law."

It should be here remarked, that the commissioners of loans had received two per centum on the sums paid out by them to pensioners prior to the year 1817; and all other agents after that time, except the United States Bank and its branches, received the same compensation. And, in addition, their accounts for stationery, printing, &c., were paid.

These terms, "no compensation or allowance," may well be satisfied by making them operate upon the two per centum which had been previously allowed to the pension agents. To make this provision extend to a prohibition of the reimbursement of moneys actually expended for the use of the government, would be, as it seems to me, doing violence to the language employed in the act, and by construction enlarging its prohibitions, so as to do injustice to individuals engaged in the discharge of a meritorious public service. It is not to be believed that Congress intended that such should be the effect of any act passed by that body; on the contrary, a fair construction of that act, deduced from its history and its language, is, that no compensation or allowance shall be made for the personal services of a pension agent. But the payment of necessary contingent expenses is not prohibited.

It will be perceived that I have not taken into view the last item of Mr. Lowe's account, because the Commissioner of Pensions expressed the opinion that some further explanation relative to that item ought to be given by Mr. Lowe.

Agreeably to the foregoing opinion, the account of Mr. King should be paid, and also the first (of \$75) in the account of Mr. Lowe.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF WAR.

Case of the Amistad—Surrender under Treaty with Spain.

CASE OF THE AMISTAD—SURRENDER UNDER TREATY WITH SPAIN.

The schooner Amistad, a Spanish vessel, having cleared from one Spanish port bound to another, with regular papers and a cargo of merchandise and slaves; and whilst at sea, being subjected to the control of the negroes on board, by their rising upon the whites and killing the captain, his servant, and two of his seamen, and assuming command with a view to carry the vessel to the coast of Africa, but failing in that object through the contrivance of two white Spaniards who run her near to the coast of the United States, where she was taken by a vessel of the United States and sent into New London for examination and such proceedings as the law of nations warranted and required; and being demanded, with the negroes, by the Spanish minister, under the ninth article of the treaty of October 27, 1795, between Spain and the United States—**DECIDED**, that the case is within said ninth article of the said treaty, and that the vessel and cargo be restored to the owners, as far as practicable, entire

The President is advised to issue his order to the marshal, in whose custody the vessel and cargo are, to deliver the same to such persons as may be designated by the Spanish minister to receive them.

ATTORNEY GENERAL'S OFFICE,
November, 1839.

SIR: I have the honor to acknowledge the receipt of yours of the 24th of September, in which, by direction of the President, you refer to this office the letter of the Spanish minister of the 6th September, addressed to you; also, the letter of Seth P. Staples and Theodore Sedgwick, jr., esqrs., who have been engaged as counsel for the negroes taken on board the schooner Amistad, addressed to the President of the United States, and asking my opinion upon the different legal questions presented by these papers.

I have given to the subject all the consideration which its importance demands; and now present to you, and through you to the President, the result of my reflections upon the whole subject.

The following is the statement of facts contained in your communication: "That the Amistad is a Spanish vessel; was regularly cleared from Havana, a Spanish port, to Guanaja, in the neighborhood of Puerto Principe, another Spanish port; that her papers were regular; that the cargo consisted of merchandise and slaves, and was duly manifested as belonging to Don Jose Ruiz and Don Pedro Montes; that the negroes, after

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being at sea a few days, rose upon the white persons on board; that the captain, his slave, and two seamen, were killed, and the vessel taken possession of by the negroes; that the two white Spaniards, after being wounded, were compelled to assist in navigating the vessel, the negroes intending to carry her to the coast of Africa; that the Spaniards contrived, by altering the course of steering at night, to keep her on the coast of the United States; that, on seeing land off New York, they came to the coast, and some of the negroes landed to procure water and provisions; that, being on the point of leaving the coast, the *Amistad* was visited by a boat from Captain Gedney's vessel; and that, one of the Spaniards claiming protection from the officer commanding the boat, the vessel and cargo, and all the persons on board, were sent into New London for examination, and such proceedings as the law of nations and of the United States warranted and required."

In the intercourse and transactions between nations, it has been found indispensable that due faith and credit should be given by each to the official acts of the public functionaries of others. Hence the sentences of prize courts under the law of nations, or admiralty and exchequer or other revenue courts under the municipal law, are considered as conclusive, as to the proprietary interest in, and title to, the thing in question; nor can the same be examined into in the judicial tribunals of another country. Nor is this confined to judicial proceedings. The acts of other officers of a foreign nation, in the discharge of their ordinary duties, are entitled to the like respect. And the principle seems to be universally admitted, that whenever power or jurisdiction is delegated to any public officer or tribunal, and its exercise is confided to his or their discretion, the acts done in the exercise of that discretion, and within the authority conferred, are binding as to the subject-matter. And this is true, whether the officer or tribunal be legislative, executive, judicial, or special. (Wheaton's *Elements of International Law*, 121; 6 Peters, 729.)

Were this otherwise, all confidence and comity would cease to exist among nations; and that code of international law which now contributes so much to the peace, prosperity, and harmony of the world, would no longer regulate and control

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the conduct of nations. Besides, in this case, were the government of the United States to permit itself to go behind the papers of the schooner *Amistad*, it would place itself in the embarrassing condition of judging upon the Spanish laws, their force, their effect, and their application to the case under consideration.

This embarrassment and inconvenience ought not to be incurred; nor is it believed a foreign nation would look with composure upon such a proceeding, where the interests of its own subjects or citizens were deeply concerned. In addition to this, the United States would necessarily place itself in the position of judging and deciding upon the meaning and effect of a treaty between Spain and Great Britain, to which the United States is not a party. It is true, by the treaty between Great Britain and Spain, the slave trade is prohibited to the subjects of each; but the parties to this treaty or agreement are the proper judges of any infraction of it, and they have created special tribunals to decide questions arising under the treaty; nor does it belong to any other nation to adjudicate upon it, or to enforce it. As, then, this vessel cleared out from one Spanish port to another Spanish port, with papers regularly authenticated by the proper officers at Havana, evidencing that these negroes were slaves, and that the destination of the vessel was to another Spanish port, I cannot see any legal principle upon which the government of the United States would be authorized to go into an investigation for the purpose of ascertaining whether the facts stated in those papers by the Spanish officers are true or not. Suppose, however, that the evidence contained in these papers should not be entitled to all the effect I have given it: would that change or alter the course which should be pursued by the government? I think it would not; and a reference to the principles of international law, as approved and sanctioned by our own judicial tribunals, will clearly show it.

In the case of the *Antelope*, (10 Wheaton, 66,) this subject was fully examined, and the opinion of the Supreme Court of the United States establishes the following points:

“1. That, however unjust and unnatural the slave-trade may be, it is not contrary to the laws of nations.

“2. That, having been sanctioned by the usage and con.

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sent of almost all civilized nations, it could not be pronounced illegal, except so far as each nation may have made it so by its own acts or laws; and these could only operate upon itself, its own subjects, or citizens. And, of course, the trade would remain lawful to those whose government had not forbidden it.

“3. That the right of bringing in and adjudicating upon the case of a vessel charged with being engaged in the slave trade, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another, and the course of the American government on the subject of visitation and search would decide any case in which that right had been exercised by an American cruiser on the vessel of a foreign nation not violating our municipal laws; against the captors.

“It follows, that a foreign vessel engaged in the African slave-trade, captured on the high seas in time of peace by an American cruiser, and brought in for adjudication, would be restored.”

The opinions here expressed go far beyond the present case; they embrace cases where the negroes have never been within the territorial limits of the nation of which the claimant is a citizen. In this case, the negroes were in the island of Cuba, a portion of the dominions of Spain; they were there recognised and treated as property by the Spanish authorities of the island; and, after this, in their transmission from the port of Havana to another Spanish port, the occurrence took place which has given rise to this investigation. This vessel was not engaged in the slave-trade; she was employed lawfully in removing these negroes, as slaves, from one port of the Spanish dominions to another, precisely in the same way that slaves are removed by sea from one slave State to another in our own country. I consider the facts as stated (so far as this government is concerned) as establishing a right of ownership to the negroes in question in the persons in whose behalf the minister of Spain has made a demand upon the government of the United States.

Under the statement of facts, another inquiry which presents itself is, What power does the government of the United States possess, or what jurisdiction has it, for the purpose of trial and punishment, over the persons of these men of color, who are

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charged with having risen upon the captain and crew, and murdered the captain and part of the crew, and took the vessel under their own control?

If these acts, according to the principles of international law, or under the acts of the Congress of the United States, constitute or amount to piracy, then jurisdiction to try and punish belongs to the United States.

The question arises, Do these acts constitute piracy?

“Piracy is defined to be the offence of depredating on the seas without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other.”

“Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction for trial by its tribunals.” (Wheaton’s *Elements of International Law*, p. 113.)

Chancellor Kent, in his *Commentaries*, (vol. 1, p. 183,) says: “Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offence at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy. Pirates have been regarded by all civilized nations as the enemies of the human race, and the most atrocious violators of the universal law of society. They are everywhere pursued and punished with death; and the severity with which the law has animadverted upon this crime arises from its enormity and danger, the cruelty that accompanies it, the necessity of checking it, the difficulty of detection, and the facility with which robberies may be committed upon pacific traders in the solitude of the ocean. Every nation has a right to attack and exterminate them, without any declaration of war; for though pirates may form a loose and temporary association among themselves, and re-establish, in some degree, those laws of justice which they have violated with the rest of the world, yet they are not considered as a national body, or entitled to the laws of war, as one of the community of nations. They acquire no rights by conquest; and the law of

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nations, and the municipal law of every country, authorize the true owner to reclaim his property taken by pirates, wherever it can be found; and they do not recognise any title to be derived from an act of piracy. The principle, that *a piratis et latronibus capta dominium non mutant*, is the received opinion of ancient civilians and modern writers on general jurisprudence; and the same doctrine was maintained in the English courts of common law, prior to the great modern improvements made in the science of the law of nations."

In the case of the *United States vs. Smith*, (5 Wheaton, 153,) the Supreme Court of the United States clearly recognise the foregoing description and definitions of piracy; and state, that the defendant in that case, and his associates, were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission of any government; and, therefore, the defendant was subject to trial within the United States. From this language it may clearly be inferred that, had the vessel been sailing under the authority and flag of any particular government, the defendant would not have been subject to trial in any court of the United States; but that his case would have been exclusively within the jurisdiction of the tribunals of that state under whose commission, authority, or flag, he was navigating his vessel. And in the case of the *United States vs. Palmer*, (3 Wheaton, 610,) the Supreme Court of the United States expressly decided that the crime of robbery committed by a person on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, was not piracy under the act of Congress approved 30th of April, 1790, and was not punishable in the courts of the United States. In the case now before me, the vessel is a Spanish vessel, belonging exclusively to Spaniards, navigated by Spaniards, and sailing under Spanish papers and flag, from one Spanish port to another. It therefore follows, unquestionably, that any offence committed on board is cognizable before the Spanish tribunals, and not elsewhere.

These two points being disposed of—1. That the government of the United States is to consider these negroes as the property of the individuals in whose behalf the Spanish minis-

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ter has put in a claim; 2. That the United States cannot proceed against them criminally;—the only remaining inquiry is, What is to be done with the vessel and cargo, the negroes being a part of the latter?

A case like the present is not embraced by any of the legal provisions contained in the different acts of Congress, so as to justify this government, in any of its departments, to act upon it for the purpose of transporting these negroes to Africa. In the construction of the different acts of Congress in relation to the slave-trade, it is to be observed that the statutes operate only where our municipal jurisdiction might be applied, consistently with the general theory of international law, to the persons of our citizens, or to foreigners on board of American vessels.—(1 Kent's Commentaries, 182; 3 Wheaton, 610.)

And it may be added, that those acts would operate, of course, upon all persons who might violate them within the limits of the United States. But the claimants of these negroes have violated none of our laws. They are within the limits of the United States, to be sure, with their own consent; but that consent resulted from, and was produced by, circumstances so imperious and overruling in their nature as to have left them no choice. They have not come within our territories with the view or intention of violating the laws of the United States; nor had they, before their arrival within the waters of the United States, been guilty of any infraction of them. They have not introduced these negroes into the United States for the purpose of sale, or holding them in servitude within the United States. So far from any illegal intention or design to violate the laws of the United States being established upon the claimants, the case clearly shows that not only no violation of our laws has been committed, but no such violation was in contemplation. It therefore appears to me that this subject must be disposed of upon principles of international law, and the existing treaties between Spain and the United States.

It would scarcely be doubted that, under the laws of nations, property rescued from pirates or robbers by a vessel belonging to a friendly power, and brought into a port of that friendly power, would be restored to the rightful owners; and this without any treaty stipulation.

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The 9th article of the treaty between Spain and the United States, dated 27th October, 1795, (which has been continued in force by a subsequent treaty,) is as follows: "All ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of, and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof."

This makes the case much stronger in favor of the Spanish claimants. There can be no difference, in reason, whether the vessel be captured on the high seas, or within our own waters or ports; because, if captured on the high seas, they are to be brought into port, and delivered into the custody of the appropriate public officers; and if captured after having already come into a port, they should be treated in like manner. It therefore seems to me that this case is clearly within the spirit and meaning of the 9th article, and that the vessel and cargo should be restored entire, so far as practicable.

My opinion farther is, that the proper mode of executing this article of the treaty in the present case, would be for the President of the United States to issue his order, directed to the marshal in whose custody the vessel and cargo are, to deliver the same to such persons as may be designated by the Spanish minister to receive them. The reasons which operate in favor of a delivery to the order of the Spanish minister are—

1. The owners of the vessel and cargo are not all in this country, and, of course, a delivery cannot be made to them.

2. This has become a subject of discussion between the two governments. And, in such a case, the restoration should be made to that agent of the government who is authorized to make, and through whom the demand is made.

3. These negroes are charged with an infraction of the Spanish laws; therefore, it is proper that they should be surrendered to the public functionaries of that government, that, if the laws of Spain have been violated, they may not escape punishment.

4. These negroes deny that they are slaves. If they should

Relief where Performance of a Mail Contract is Impossible.

be delivered to the claimants, no opportunity may be afforded for the assertion of their right to freedom. For these reasons, it seems to me that a delivery to the Spanish minister is the only safe course for this government to pursue.

I have the honor, &c., &c.,

FELIX GRUNDY.

To the SECRETARY OF STATE.

RELIEF WHERE PERFORMANCE OF A MAIL CONTRACT IS IM-
POSSIBLE.

Where proposals, in the usual form, for the transportation of the mail between certain specified points, had been advertised and accepted without certain knowledge, on either side, that the condition of the roads was such that coaches could pass over the route, and, after trial, it was found that they were not such as to permit the execution of said contract, according to its terms—**DECIDED**, that the contractor be released from further obligations under it, and that he receive compensation for transporting the mail by steamboat, &c.

ATTORNEY GENERAL'S OFFICE,

November 11, 1839.

SIR: I have had the honor to receive your communication relative to the failure of Albert Toby to perform his contract for carrying the mail in four-horse post coaches from Helena to Little Rock, in the State of Arkansas.

His failure, it appears, has been produced by no want of good faith or energy on the part of Toby, but by circumstances wholly beyond his control or that of the Post Office Department, to wit: the want of a suitable road or highway over which four-horse post coaches could pass and repass. Of the certainty of this fact, both the Post Office Department and the contractor must be presumed to have been ignorant (and in fact were so) until after the contract had been entered into, and experience tested the impossibility of fulfilling its stipulations. The character of the country, too, (it having been but recently settled,) and the sparseness of its population, together with the circumstances and situation of the parties, all afford conclusive evidence that both parties entered into this contract without any definite knowledge of those facts which subsequently came to light, and which rendered the performance of the contract

Relief where Performance of a Mail Contract is Impossible.

impracticable. The Post Office Department, surely, would never have made a public advertisement through the medium of the newspapers, in the usual form, and inviting persons to bid for carrying the mail in four-horse post-coaches between the points specified, if it had been known at the time that such a service was impossible of performance. And, on the other hand, the fact that the Post Office Department did issue such a notice to the public, without qualification or explanation, was a weighty reason why the contractor should have taken it for granted, in the absence of personal or other good information to the contrary, that the proposed contract could be performed. It appears, then, that the making of this contract was commenced and completed without certain knowledge of the fact that it could not be performed. I say *certain knowledge*; because it appears that, before the final completion of the contract, doubts began to be entertained relative to the practicability of its performance; which doubts gained strength in proportion to the progress of the information of the parties, and resulted in the establishment of the fact which has created the present difficulty. I repeat, then, that it appears conclusively that the present embarrassment in this case has proceeded from a mutual want of information, for which neither can be properly held responsible; and in relation to the department, it must necessarily act, in all ordinary cases of this kind, upon the representations of others, and especially of those who are chiefly interested in the establishment of the route, and the faithful performance of the contract for carrying the mail upon it. Under these circumstances, it is my opinion that, upon principles of justice and equity, the contractor in this case is entitled to some relief. And to what extent I consider him thus entitled, I will now proceed to state.

It is my opinion and advice to the department, that, as the contractor has already thrown up the contract, he should, in pursuance of the above conclusions, be released from all further obligations under it; and as to the verbal understanding to transport the mail by steamboats, it never was legally binding. That, as to the services rendered by steamboat conveyance on the White river, in substitution of the contract service, he shall receive compensation agreeably to the contract, and

Relief where Performance of a Mail Contract is Impossible.

nothing more. This was a voluntary service; it has been performed under the clear understanding of both parties that it was in lieu of the contract service, and at the same price; but I am of opinion that Mr. Toby is not responsible for the increased expense which the department has to pay for this substituted service, and that it ought not to be charged to Toby's account as a damage occasioned by his failure.

And, lastly, I do not perceive that the department can take any official notice of the agreement or partnership between the contractor and James & Hanna; and that, in making payments, Albert Toby, the original contractor, and the only individual who is responsible to the department, is also the only person to whom they can properly be made.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the POSTMASTER GENERAL.

OPINIONS

OF

HON. HENRY D. GILPIN, OF PENNSYLVANIA:

APPOINTED JANUARY 11, 1840.

INTEREST ON STATE STOCKS HELD IN TRUST FOR CHICK- SAWS.

Interest cannot be legally claimed upon the stocks issued by the State of Maryland, and redeemable at the pleasure of the State, which are held in trust for the Chickasaws, from the time when the funds were provided by the State for the redemption of the principal.

A legislative provision ought to be regarded as notice, by a State to the holders of its stock, sufficient to bar any legal claim to subsequent interest.

ATTORNEY GENERAL'S OFFICE,
February 8, 1840.

SIR: I had the honor to receive your letter of the 23d of January, relative to the payment of interest by the State of Maryland on the certificate of State stock, "redeemable at the pleasure of the State," which is held by the department in trust for the Chickasaws.

You do not state whether an act of the legislature was passed appropriating the funds to redeem the principal; but as I understand from the statement of the Treasurer, to which you refer, that "these funds were provided by the State, and ready on that day," and would then have been paid if called for, I presume such was the case. Though it is usual, and certainly desirable, that more explicit public notice should be given, yet I am of opinion that such a legislative provision ought to be regarded as notice by a State to the holders of its stock, and that there is no legal claim to subsequent interest.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Certified Fees of Marshals—Accounting Officers.

REPAIRS IN FRONT OF LEASED TENEMENTS IN WASHINGTON.

Repairs in front of leased tenements in the city of Washington are, by act of the corporation of the 1st of August, 1831, required to be made by the owners, who are, in general, the lessors; and where the leases are silent upon the subject of such repairs, the law regulating repairs in the District may properly be considered and taken as a part of the contract.

ATTORNEY GENERAL'S OFFICE,
February 13, 1840.

SIR: I had the honor to receive your letter of the 30th January, enclosing the lease of Mr. Tayloe of the building now occupied by the Post Office Department, with copies of the leases of the Treasury Department therein referred to.

In reply to your inquiry whether the lessee is bound to repair the pavement in front of the building, I have to say that there is nothing in the terms of this lease, or of those of the Treasury Department referred to therein, which imposes that obligation on the lessee. The law regulating such repairs in the District ought, however, to be properly considered as a part of the contract, no express stipulation being made on the point. I find, by reference to the act of the corporation of the 1st of August, 1831, that the owner of the adjacent lot is required to make such repairs. If, therefore, there is no subsequent regulation on the subject, the repairs in this instance must be made by the lessor.

H. D. GILPIN.

To the POSTMASTER GENERAL.

CERTIFIED FEES OF MARSHALS—ACCOUNTING OFFICERS.

Where a marshal received, in due course of law, processes of summons and subpoena for the same witnesses, (it being the usual mode of procuring the attendance of witnesses in the court from which they issued,) and served the same as required, he is entitled to his fees for both services, on their being allowed and certified by the district judge.

Marshals have no control over the practice of the courts, nor over the kind of process which they may issue; they are simply bound, as officers of the courts, to execute the process issued to them.

Certified Fees of Marshals—Accounting Officers.

In a matter of general and established practice, the regular taxation of the costs, and their allowance in due form by district judges, are binding and conclusive upon the accounting officers.

ATTORNEY GENERAL'S OFFICE,

February 14, 1840.

SIR: I had the honor to receive your letter of the 7th instant, enclosing that of the First Comptroller of the Treasury, dated the same day, relative to the case of Mr. Waddell, the late marshal of the southern district of New York, and requesting my opinion on the points of law embraced in the letter of the Comptroller. I must be excused for noticing the imperfect manner in which the facts submitted to my consideration are stated, and the want of any distinct question on which my reply is expected. Although the legality of the marshal's proceeding is doubted, and the correctness of the allowance of the district judge is questioned, yet the statement of the Comptroller does not exhibit distinctly whether the proceedings of the marshal were in pursuance of distinct and separate process, nor the nature of the process which he served, the particular costs which were taxed, the mode of taxation, or the nature and extent of the allowance by the district judge. I am left, therefore, to infer the necessary facts and circumstances from the general statement, and I understand them to be these: The marshal of the southern district of New York received, in due course of law, process directing him to *summon* witnesses, and also a *writ of subpoena*, in addition to the summons, and distinct therefrom. This double process I understand to be the usual mode of proceeding to secure the attendance of witnesses in the court from which it issued, and that the costs thereof (having been duly taxed as such by the court) were allowed and certified by the judge. Upon this state of the facts, my opinion is asked, whether the marshal is entitled to costs, both for summoning the witness and serving the writ of subpoena; and whether the accounting officers are bound to credit him with them on their being allowed and certified by the district judge?

If such are the facts, and if these are the questions submitted to me, I consider each as having been answered in the affirmative in the decision of my predecessor of the 20th of March,

Right of Enlisted Soldiers to Bring Actions for Assaults.

1838, referred to by the Comptroller; and in that decision I concur. Although it may be that the double process, which appears to exist in the practice referred to, might be well dispensed with, yet that is a matter resting with the court, which the marshal has no authority whatever to control; and I conceive that he is bound, as the officer of the court from which it issues, to execute it when it comes to his hands. I am also of opinion that, in a matter of general and established practice, (such as I understand this to be,) the regular taxation of the costs, and their allowance in due form by the district judge, are clearly within his authority, and binding on the accounting officers.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

RIGHT OF ENLISTED SOLDIERS TO BRING ACTIONS FOR ASSAULTS.

The laws of the United States do not prohibit persons enlisted in the military service of the United States from bringing actions to recover damages, in State courts, for assaults and batteries committed on them by non-commissioned officers within the limits of a fort.

OFFICE OF THE ATTORNEY GENERAL,

February 18, 1840.

SIR: I had the honor to receive your letter of the 24th of January, enclosing the report of Major Gardner, dated 21st December, and asking my opinion on the questions of law arising out of the facts stated in that report. The questions are, whether there is anything in the laws of the United States to prevent a person enlisted in the military service of the United States from bringing an action to recover damages in the proper tribunal of the State of Michigan, for an assault and battery which has been committed on him in a personal quarrel by a non-commissioned officer within the limits of Fort Gratiot? And, also, whether the provision of the act of Congress of the 11th of January, 1812, which prohibits the arrest of an enlisted soldier for a debt incurred subsequent to his enlistment, is applicable to an action so brought to recover damages for a personal injury?

Scrip for Virginia Land Warrants.

In reply, I have to say that, in my opinion, both questions must be answered in the negative.

The report of Major Gardner is herewith returned.

H. D. GILPIN.

To the SECRETARY OF WAR.

SCRIP FOR VIRGINIA LAND WARRANTS.

Scrip may be issued on a Virginia land warrant dated subsequent to September 1, 1835, in cases where it shall appear that such warrant is not an original one, but was only issued in place of one issued improvidently to wrong heirs prior to September 1, 1835, and cancelled by Virginia, as it is in the nature of an exchange warrant, and may be treated as if issued within the time provided by law.

ATTORNEY GENERAL'S OFFICE,

February 18, 1840.

SIR: I had the honor to receive your communication addressed to my predecessor, dated November 18, 1839, in which you inquire whether the second section of the act of March 3, 1835, appropriating land to satisfy Virginia land-warrants, justifies the issue of scrip on a warrant dated "October 26, 1839, and offered in the place of another, cancelled by Virginia, which had been improvidently issued to wrong heirs," as certified by the register of Virginia; which warrant had been filed and estimated for in the General Land Office prior to the 1st day of September, 1835. The act of March 3, 1835, provides "that no scrip shall be issued until the 1st of September, 1835, and that warrants shall be received in the General Land Office until that day; and immediately thereafter, if the amount filed shall exceed six hundred and fifty thousand acres, the Commissioner of the General Land Office shall apportion the said six hundred and fifty thousand acres of land among the warrants which may be then on file, in full satisfaction thereof."

It is plain that, under this law, the Commissioner of the General Land Office had no authority to apportion land in satisfaction of a warrant issued after the 1st day of September, 1835; but where an apportionment had been made, pursuant to this provision, upon a warrant issued previous to the 1st of September, 1835, in favor of the heirs of a person who was

The President and Accounting Officers in the Case of Otis.

legally entitled thereto; and it subsequently appeared to the satisfaction, and by the certificate, of the authorities empowered to decide thereon and to issue the warrant, that the same had been improvidently issued to wrong heirs; both reason and justice, as well as the policy of the law, require that the apportionment made on the warrant should be no farther avoided than to substitute the persons ascertained by the proper authorities to be the right heirs, for the wrong ones, to whom the warrant had improvidently issued.

Although, therefore, a warrant dated on the 20th of October, 1839, would not be a proper legal basis for an issue of scrip under the act of Congress referred to, if it were to be considered as an original warrant; yet my opinion is, that when such warrant so dated is merely in the nature of an exchange warrant, and is so certified by the proper authority to the Commissioner of the General Land Office, and the original one cancelled solely for such cause, the Commissioner should issue scrip thereon in the same manner as if it had been filed before the 1st day of September, 1835, to the extent and in lieu of the cancelled warrant.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

THE PRESIDENT AND ACCOUNTING OFFICERS IN THE CASE OF OTIS.

The President cannot lawfully express any opinion respecting the claim of William Otis until the accounting officers shall have passed upon and settled all the items of the account. For him to do so, would be inconsistent with the act of Congress, and at variance with the established system of auditing and settling accounts at the treasury.

ATTORNEY GENERAL'S OFFICE,
March 16, 1840.

THE President, on submitting to the Attorney General the papers from the accounting officers relative to the case of William Otis, late collector of the customs for the district of Barnstable, in the State of Massachusetts, suggested the doubt whether the question referred for his decision was within the intent of the proviso of the act of the 2d of March, 1829.

Boundary between Lands of Chas. Morgan and Point Coupee.

On examining the papers, I am of opinion that it is not. The act of Congress, after directing the "proper accounting officers of the treasury" to audit and settle the claims of Mr. Otis upon principles of justice and equity, contains a proviso, that before the sum which they shall decide to be due on those principles shall be paid, their decision must receive the approval of the President. The papers now submitted to the President do not exhibit such a decision. On the contrary, it is evident that the account has not been settled; but that a difference exists between the First Comptroller and the First Auditor as to the propriety of their allowing a certain item of claim in the settlement; and this prevented the decision by them which the act of Congress contemplates. It appears to me, therefore, to be not only inconsistent with the intentions of this particular act for the President to express an opinion, at this stage, on the propriety of allowing or disallowing the item in question, but also at variance with the established system of auditing and settling accounts at the treasury. It is, therefore, respectfully submitted whether it would not be proper to refer the documents again to the First Comptroller, with these views, in order that a final decision on all the items of the account may be made before the sanction and approval of the President are given.

H. D. GILPIN.

To the PRESIDENT OF THE UNITED STATES.

BOUNDARY BETWEEN LANDS OF CHARLES MORGAN AND POINT COUPEE.

The report of the land officers of the 20th December, 1817, and the confirmatory act of Congress of the 11th of May, 1820, ought to be regarded as confirming the title of Morgan to the full extent of his grant issued by Governor Galvez on the 24th of January, 1777.

ATTORNEY GENERAL'S OFFICE,

March 20, 1840.

SIR: I had the honor to receive your letter of the 8th of February, enclosing that of the Commissioner of the General Land Office, dated 6th of February, relative to the disputed boundary between the lands claimed by Charles Morgan and the inhabitants of the parish of Point Coupée.

Boundary between Lands of Chas. Morgan and Point Coupée.

In answer to the first inquiry, which relates to the boundary of the tract derived by Mr. Morgan under the Spanish grant issued by Governor Galvez on the 24th of January, 1777, I have to say, that, in my opinion, the report of the land officers of the 20th December, 1817, and the confirmatory act of Congress of the 11th May, 1820, should be regarded as confirming the title of Mr. Morgan to the full extent of that grant; and that the claim of the inhabitants of the parish of Point Coupée must yield to it, whenever the two come in conflict. I am, also, of opinion that Mr. Morgan's tract should be of the full extent which was authorized by the laws and usages of Louisiana, when such grant was located on the bend of the river; and that the divergency of the side lines should be regulated by the same laws and usages. Whether this has been done in the surveys of 1806 and 1826, (which appear to have been made under the authority of the General Land Office, and not there objected to as incorrect on this score, during a long period of years,) is a matter of fact, upon which there is much conflicting evidence, and upon which I cannot express an opinion. If, however, those surveys are not recognised by that office as being in accordance with the principles above laid down, I am of opinion that the survey and location under the grant of Governor Galvez should still be made in conformity with them.

In answer to the second inquiry, which relates to the claims of Mr. Morgan and the inhabitants of the parish of Point Coupée, which are numbered, respectively, No. 250 and No. 251 in the report of the land officers of the 5th of September, 1833, I am of opinion that the evidence submitted to me with the letter of the Commissioner of the General Land Office is not sufficient to authorize the formation of any decision. In the above report of the land officers, they appear to be satisfied that Mr. Morgan was in actual possession of one of the tracts in question; and that the police jury of the parish of Point Coupée had taken possession of the other in 1815, and retained it ever since; yet it is now alleged that the latter actually embraces and covers the former. As far as I perceive by the documents, no examination as to this material discrepancy appears to have been made by the land officers of the United States; no testimony on this point has been received or sought from Mr. Mor-

Equipage of the Tennessee Volunteers.

gan; and nothing is submitted by which I am enabled to reconcile or account for this difference as to the fact upon which the whole question turns. I am, therefore, of opinion, that, before these two conflicting claims can be properly settled, a further examination of the facts, especially as to the actual location and possession of the tracts claimed by each party, should be made; and that a further opportunity should be afforded to both of them to submit such evidence as they may deem necessary.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

EQUIPAGE OF THE TENNESSEE VOLUNTEERS.

The board appointed to value the horses having also valued the equipage, and the same having been turned over to the United States with the horses, a portion of which were wanted by the commanding general for immediate service, the inference is warranted that the equipage was turned over with the horses, within the meaning of the law.

ATTORNEY GENERAL'S OFFICE,

March 26, 1840.

SIR: I had the honor to receive your letter of the 10th instant, requesting an opinion relative to the clause of the act of 3d of March, 1839, which makes an appropriation for certain payments to the Tennessee volunteers, and especially inquiring whether, upon the facts stated in the several communications enclosed, the equipage was to be considered as turned over with the horses, within the meaning of that act—that is, “by order of the commanding general or other commanding officer.”

It appears by the papers submitted, that no written order was issued in regard either to the horses or equipage; but that a board of officers was appointed to value the horses, without special reference being made to the equipage. It appears that, in executing this order, the board valued the equipage as being equally included within the duty assigned them; and that it was in point of fact turned over to the United States, with the knowledge of the board, at the same time with the horses. It appears that the horses were wanted by the commanding general for immediate use in the company, which necessarily

Attorneys of the Cherokee Indians.

required that their equipage should be received with them; and that at least a large portion of them were accordingly engaged in immediate service.

I am of opinion that these facts clearly warrant the inference that the equipage was turned over with the horses, within the meaning of the law.

H. D. GILPIN.

To the SECRETARY OF WAR.

ATTORNEYS OF THE CHEROKEE INDIANS.

Whilst the claim of an attorney for the Cherokees cannot be paid out of funds due them under the 9th article of the treaty—if the department shall be satisfied that the contract between him and his principal is free from fraud, and his claim is for a just compensation for services rendered, the department ought to recognise him as having an interest in the fund, and pay him accordingly.

Payments may be made directly to the Indians, yet care should be taken that those who have rendered them service in collecting evidence, &c., be not defrauded.

ATTORNEY GENERAL'S OFFICE,

March 26, 1840

SIR: I had the honor to receive your letter of the 9th instant, enclosing the communications of the Commissioner of Indian Affairs and of Mr. Churchill, and requesting an opinion relative to the construction of the Cherokee treaty of the 29th of December, 1835.

Your first inquiry is, whether the provisions of the 9th and 17th articles (which direct that the just debts of the Indians shall be paid out of any moneys due them for their improvements and claims, and that all claims arising under, or provided for by the treaty, shall be examined and adjudicated by certain commissioners, whose decision shall be final,) apply to the case of a person to whom no debt was owing at the date of the treaty, but who has acted as an attorney of the Indian, for the recovery of his claim, and has had the sum in question adjudicated to him as a proper compensation for so acting. In reply to this inquiry, I have the honor to say, that I do not consider this to be one of the debts intended to be provided for by the 9th article of the treaty. I am of opinion, however,

Patent for the Mackay Grant in Missouri.

that if the person presenting the claim was a duly constituted attorney of the Indian, with authority to prosecute and recover the claim, and the department is satisfied that the contract between him and his principal is free from fraud, and is a just compensation for services rendered—in such a case he has an interest in the fund, which the department ought to recognise; and it should not, by paying over the whole amount to the Indian, subject him to the probable danger of loss, and the certainty of much expense and delay.

Your second inquiry is, whether the whole scope of the treaty does not warrant a payment to the Indians, in person, of such sums as may be due to them under it; or whether they must be paid to persons who present powers of attorney from them? In reply to this inquiry, I have the honor to state, that the treaty clearly recognises payments directly to the Indians, and the department will be fully warranted in so making them. I beg, however, to observe, that I consider the remarks I have made, in reply to your first inquiry, as equally applicable to these cases; for, certainly, where an attorney has performed an important service, collected the evidence, and been instrumental in securing a claim which might otherwise have been lost; and where this has been done under the stipulation, or with a *bona fide* understanding that he was to receive the amount to which he was entitled directly from the United States, he has an interest in the fund which the principal himself could not revoke, and which the department is bound to recognise.

H. D. GILPIN.

To the SECRETARY OF WAR.

PATENT FOR THE MACKAY GRANT IN MISSOURI.

The claim of the heirs of Mackay, founded on a special grant made in the year 1799, containing an exact description of the land, and accompanied with uninterrupted possession ever after, having been submitted to the district court of Missouri, and by appeal to the Supreme Court of the United States, and adjudged to be a valid and lawful grant, a patent should issue to the heirs for it, notwithstanding New Madrid sufferers may have located upon it.

Patent for the Mackay Grant in Missouri.

But, to protect any adverse rights that may exist, the patent should contain a clause reserving the rights now or heretofore existing, of all just and legal adverse claimants to the whole or any portion of the land patented.

ATTORNEY GENERAL'S OFFICE,
March 27, 1840.

SIR: I had the honor to receive your letter of the 19th instant, requesting an opinion on three questions proposed by the Commissioner of the General Land Office, in his letter to you dated the 18th instant, relative to the issuing of patents in certain cases of private land claims in Missouri, which are therein stated.

As it appears from the papers transmitted with the Commissioner's letter that an early decision on the first question is of great importance, and that any unnecessary delay may injuriously affect the rights of private individuals; and as it appears, also, that this question has already received the careful examination of my predecessor, Mr. Butler, as well as of Mr. Wirt, so far as the principles involved in it are concerned—I have thought it most proper to communicate at once my views in regard to it, reserving for another communication my opinion on the two remaining questions.

The question of the Commissioner of the General Land Office is, "whether or not a patent shall issue for the survey of the Mackay claim, which was confirmed by a decree of the Supreme Court of the United States in 1836, notwithstanding portions of that claim are covered by New Madrid locations, under the act of Congress of February 17, 1815; and if a patent is to issue, whether or not there should be inserted in it a reservation in favor of all just and legal adverse claimants?"

The facts of this case have been the subject of such repeated examination, that it is unnecessary for me to restate them, or to do more than remark—that the claim of the heirs of Mackay, being founded on a special grant made in the year 1799, containing an exact description of the land, and accompanied with uninterrupted possession ever after, was submitted by them, in accordance with the provisions of the act of 26th May, 1824, to the district court of Missouri, from which it was brought by appeal to the Supreme Court of the United States,

and by that tribunal adjudged, at January term, 1836, to be a valid and lawful grant.

•Upon this decree being made, the land in question was duly surveyed; a certificate of survey was duly presented to the Commissioner of the General Land Office, and a patent from the President of the United States has been since then repeatedly demanded.

The delay or refusal to issue the patent appears to have grown out of the fact that, under the provisions of the act of the 17th February, 1815, (by which any person owning lands at New Madrid, that had been injured by earthquakes, was authorized to locate the like quantity of land on any of the public lands in the Territory of Missouri, "the sale of which was authorized by law,") Baptiste Lafleur obtained a location certificate, dated 7th July, 1817, and a survey of a tract of 601 acres, which he located upon the tract which was embraced by the grant of Mackay; and also that on the 17th of July, 1817, Nathaniel Shaw obtained a location certificate and a survey of a tract of 189 acres, of which 78 were located upon the same tract of Mackay. For the second of these locations (that of Shaw) no patent has been issued, nor does it appear that it was demanded. For the first, (that of Lafleur,) a patent was formally demanded in the year 1825, by Mr. Bates; and the subject was fully discussed and submitted to Mr. Wirt, then the Attorney General, for his opinion. He decided that "the reservation of lands to which claims had been filed, as set forth in the proviso of the 10th section of the act of 3d March, 1811, became permanent, and, being excepted from the sale of public lands, did not fall within the description of those lands on which the New Madrid sufferers were authorized to make locations." He therefore was of opinion that the demand of Mr. Bates for a patent should not be acceded to, but that "all executive action on the subject should cease till the judiciary should have decided on the claims." After this opinion, a patent was withheld; but, from some cause not stated in any of the documents before me, one was afterwards issued on the 13th June, 1827, to Lafleur, for the 601 acres embraced in his New Madrid certificate.

These were the circumstances which led the Commissioner

Patent for the Mackay Grant in Missouri.

of the General Land Office to doubt the propriety of giving the heirs of Mackay a patent, although their claim was confirmed by the Supreme Court in 1836, and induced him, in the year 1838, to submit the subject, in the first instance to the Solicitor of the General Land Office, and subsequently to Mr. Butler, then the Attorney General. Both these officers concurred in considering the New Madrid locations as void, on the same ground which led Mr. Wirt to the opinion above stated; and Mr. Butler advised, distinctly, and after consideration, "that the heirs of Mackay were entitled to a patent for the full amount of their claim."

The opinion of Mr. Butler having, however, reference to other cases than that of Mackay, resembling it in some respects, but differing in others, and presenting, as it was thought, strong grounds for submitting the whole subject to Congress, rather than proceeding under the existing authority of the General Land Office—that course was adopted, with the advice and approbation of the Attorney General, Mr. Grundy. On the 25th of January last, the documents relating to these cases, and including that of Mackay, were transmitted by the Commissioner to the Committee on Private Land Claims of the Senate, with a recommendation that a declaratory law should be passed, "as indispensable to the just determination of the several interests involved." On the 11th instant, a letter was addressed by the chairman of that committee to the Commissioner, in which he states that it is not their intention to recommend to the Senate the passage of any bill that would have any effect to interfere with the issuing of patents under the act of Congress of 26th May, 1824, which gives to the courts of the United States power to adjudicate on Spanish and French grants; and that, so far as the committee was concerned, they preferred that the General Land Office should carry out that law as it might think its provisions authorized.

In consequence of this determination, the Commissioner thinks it proper that the subject should be now definitively acted upon by the department; and with that view my opinion is asked upon the question (among others) in regard to which I have offered the preceding observations. It would hardly seem to be necessary, after the elaborate consideration given to

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it by Mr. Wirt and Mr. Butler, that I should do more than say that I entirely concur with them in the opinion at which they arrived, and that I think the heirs of Mackay are entitled to a patent.

The only point on which I have entertained a doubt in regard to this case, is, as to the issuing a patent to the heirs of Mackay, while a previous patent for a portion of the same land has been suffered to remain outstanding, or has not been recalled by the Land Office, or revoked by a judicial tribunal. It is to be observed, however, that, from the statements in the documents submitted to me, it is evident that Lafleur has never been in possession under the patent, while the heirs of Mackay have continued in uninterrupted possession for nearly forty years. A patent, therefore, to the latter, will have no effect to interfere with the former; while it may protect the present possessors from being turned out of the land by means of the patent improvidently issued by the officers of the government to persons not legally entitled to it. But, in addition to this matter of fact, it is evident, by a reference to the act of 26th May, 1824, that the adverse claim of Lafleur must have been subjected to judicial investigation, and the patent, if not formally repealed, yet fully considered and pronounced upon. The first section of the act requires a claimant to set forth in his petition the name of any adverse claimant to the same lands; a citation is to be served upon him; and the decree of the court is to settle and determine all questions arising in the cause relative to the title of the several claimants. The decree, therefore, in that case, is, to all intents, a judicial decision on the validity of Lafleur's patent; and while a new judicial proceeding would injure the present possession of the real owner, by the delay necessary to obtain it, it would be, in fact, no more than asking from the same court, under a different form, a repetition of the same decree which it has already substantially given. I therefore recommend the issuing a patent to the heirs of Mackay, setting forth the final judgment of the Supreme Court by which the validity of their grant was established; but, to protect any adverse rights, if such exist, I think it should contain a clause which shall expressly reserve the rights now or heretofore existing, of all just and legal adverse claimants to the whole or any portion of the land patented.

Expenses on Account of the Amistad Negroes.

Before closing this letter I beg to make two observations: First, that the facts of the case, as I have referred to them, are collected from the various documents submitted to me; and if erroneous in any material particular, they must be corrected by the proper officer. My opinion is given upon them as stated. Secondly, that this opinion is confined to the particular case of the heirs of Mackay; and, being founded on the peculiar circumstances of that case, it is not intended to be applied as a general rule to any other case in which the facts may be different.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

EXPENSES ON ACCOUNT OF THE AMISTAD NEGROES.

The expenses incurred on account of the negroes taken out of the Amistad cannot be defrayed from the appropriation of the 3d March, 1819, in the act in addition to the acts to prohibit the slave-trade.

ATTORNEY GENERAL'S OFFICE,

April 11, 1840.

SIR: I had the honor to receive your letter of the 27th March, in which you inquire "whether the money appropriated by the act of the 3d March, 1819, entitled 'An act in addition to the acts prohibiting the slave-trade,' can be legally applied to defray expenses incurred on account of the negroes taken out of the Amistad?"

In reply I have to say, that, taking the facts in regard to these negroes as stated in the letter dated November, 1839, from my predecessor to the Secretary of State, I am of opinion that their case is not embraced by the provisions of the act of Congress to which you refer; and, therefore, that no part of the appropriation made by the seventh section of that act can be applied to their safekeeping and support.

H. D. GILPIN.

To the SECRETARY OF THE NAVY.

Compensation of Commissioner, &c., of Indian Emigration.

COMPENSATION OF COMMISSIONER AND SUPERINTENDENT OF
INDIAN EMIGRATION.

The same individual having been appointed, under the act of 30th June, 1834, a superintendent of Indian emigration at a stipulated salary, and afterwards a commissioner to negotiate a treaty with the Miamies at a per diem compensation, cannot, under the 30th section of said act, receive but one compensation during the same period.

ATTORNEY GENERAL'S OFFICE,

April 15, 1840.

SIR: I had the honor to receive your letter of the 23d of January, transmitting sundry papers from the Commissioner of Indian Affairs, relating to the claim of Colonel Pepper for additional compensation as a commissioner to negotiate a treaty with the Miami Indians in 1838, and requesting my opinion upon the point of law involved in the case.

I do not find among the papers any statement either of the facts of the case, or of the question of law on which my opinion is desired. As I collect the facts from the papers sent me, they are these: In the year 1838, Colonel Pepper was appointed, in conformity with the provisions of the act of 30th June, 1834, and the regulations authorized by and adopted under the same, a superintendent of Indian emigration, and was allowed therefor an annual salary of \$2,000. In the course of the same year he was also appointed, under instructions from the Secretary of War, through the Commissioner of Indian Affairs, one of the commissioners recognised by the same regulations to negotiate a treaty with the Miami Indians, for which he was to receive a compensation of eight dollars a day. This service he satisfactorily performed. On presenting his accounts, he claimed to be allowed the stipulated compensation at the same time, and during the same period, for each class of service. This claim was rejected by the Commissioner of Indian Affairs, as inconsistent with the 10th section of the act of 30th June, 1834, which forbids any person to hold more than one office at the same time under that act; and which, in his opinion, was intended to preclude those employed in the Indian department from receiving the salary or compensation of more than one office during the same period.

Coastwise Trade under Act Prohibiting Slave-Trade.

Upon this statement of facts, I am of opinion that the decision of the Commissioner of Indian Affairs was correct, and that one compensation only should be allowed to Colonel Pepper for the same period.

H. D. GILPIN.

To the SECRETARY OF WAR.

COASTWISE TRADE UNDER ACT PROHIBITING SLAVE-TRADE.

Steamboats and other vessels passing from Pontchartrain, by Lake Borgne and Pascagoula bay, to Mobile, and touching on their passage at intermediate places, are not to be considered as sailing coastwise, within the meaning of the act of 2d March, 1807, to prohibit the importation of slaves.

The navigation between New Orleans and Mobile, by the route described, is authorized in any vessel whatever.

The object of the act is to prevent the slave-trade by vessels from the sea, without evidence that the slaves on board had been previously within the United States.

ATTORNEY GENERAL'S OFFICE,

April 16, 1840.

SIR: I had the honor to receive your letter of the 13th January, enclosing certain documents in relation to the conduct of B. J. Shain, surveyor and inspector of Port Pontchartrain, and inquiring "whether the route taken by steamboats and other vessels passing from Port Pontchartrain, by Lake Borgne and Pascagoula bay, to Mobile, and touching on the passage at intermediate places, is to be considered as sailing coastwise, within the meaning of the act of 2d of March, 1807, entitled 'An act to prohibit the importation of slaves,' &c."

The facts of the case, as disclosed in the documents, appear to be, that the steamboat plying between New Orleans and Mobile passes through Lake Pontchartrain, Lake Borgne, the bay of Pascagoula, and the bay of Mobile, touching at several places along the shores of each, and entering the bays of St. Louis and Biloxi. It is contended that on this voyage, when passengers are going from place to place on the route, having their slaves or servants with them, the provisions of the act of 2d March, 1807, relative to transportation of slaves coastwise, must be complied with; the manifests therein specified be made out, and the oaths be taken which are therein prescribed.

The provisions of the act in question, which have reference to the case, are those contained in the 8th and 9th sections. The former of these forbids the master of a vessel of less than forty tons from taking on board or transporting any negro, for the purpose of disposing of him as a slave, or with intent that he may be so disposed of; but it contains an express provision which authorizes the transportation of the negroes, in any vessel whatever, "on any river or inland bay of the sea, within the jurisdiction of the United States." The 9th section requires the master of a vessel of more than forty tons, *sailing coastwise*, from one port to another of the United States, who has on board any negro for the purpose of being disposed of as a slave, or held to service or labor, to deliver to the collector or surveyor a manifest of such negro previous to the departure of his vessel from port, and to make oath that the negro so transported was not imported into the United States since the 1st of January, 1808, and that he is held to labor under the law of the State. Upon this, the collector or surveyor is to give the captain a permit, authorizing him to proceed to the port of destination. This permit is to be delivered to the collector or surveyor, on arrival at the port; and no other negroes than those so stated are to be taken on board during the voyage.

I am of opinion that the navigation between New Orleans and Mobile, by the route mentioned in the documents before me, is clearly within the proviso of the 8th section, and, as such, authorizes the transportation of slaves "in any vessel whatever." Lake Pontchartrain, Lake Borgne, and the bays of St. Louis and Biloxi, are, in the strictest sense, inland bays of the sea; and the bay of Pascagoula is separated from it by a range of islands, the channels between which only admit the entrance of vessels of a very small draught.

I am also of opinion that the terms of the 9th section in regard to vessels of more than forty tons "*sailing coastwise*," do not apply to vessels navigating rivers or inland bays of the sea, within the jurisdiction of the United States; but that they are used in contradistinction to such interior navigation, and are meant to apply to vessels sailing along the seacoast, or in open bays of the sea, on voyages from one port or revenue district to another. The evident and declared object of the act is to

Actions against Debtors in the Indian Country.

prevent the slave trade, and to guard against facilities which might be given for its prosecution if any vessel were allowed to enter the ports of the United States *from the sea*, without clear evidence that the slaves on board had been previously within the jurisdiction of the United States. Hence the necessity of requiring the manifest at the ports of departure and arrival, and the oaths of the master, owner, and shipper, that the slaves had not been imported from abroad subsequent to the 1st of January, 1808, and the prohibition to take any on board in the progress of the voyage. It was not the design of the act to regulate the interior transportation of the slaves, which does not, in any way, interfere with the object for which the law was intended to provide.

It may also be observed, as evident, that the use of the phrase "sailing coastwise" is not to be taken as signifying every vessel engaged in the coasting trade; from the fact, that although the laws regulating that trade embrace in their provisions all vessels within the jurisdiction of the United States, which are not engaged in foreign trade, whether they navigate the interior or exterior waters, yet they constantly refer to those sailing "on the seacoast," as distinct from those which ply on internal waters. With much more force, then, may this distinction be regarded as within the intention of Congress, when they use the phrase "sailing coastwise" in an act of which the object is to guard against an illicit foreign trade; but not to interfere with voyages prosecuted "on rivers or inland bays of the sea."

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

ACTIONS AGAINST DEBTORS IN THE INDIAN COUNTRY.

There is no provision of law concerning intercourse with the Indian tribes, or conferring jurisdiction upon courts, which can enable the United States to maintain a civil action against a debtor residing in the Indian country, upon a contract or indebtedness created in the States.

ATTORNEY GENERAL'S OFFICE,

April 17, 1840.

SIR: I had the honor to receive your memorandum endorsed on the letter of the district attorney of the United States for the

 Compensation of District Attorneys.

district of Arkansas, dated the 23d of January, 1840, and have considered the inquiry therein stated. That inquiry is, whether there is any mode by which a civil suit may be instituted and prosecuted on behalf of the United States, against a debtor of the name of Noland, who is now residing in the Indian country, without the jurisdiction of any State or organized Territorial government. I have examined the acts of Congress relating to the Indian country, and regulating intercourse with the Indian tribes; but have not been able to discover that any judicial tribunal has been established by Congress, with jurisdiction over such a case; or that any provision has been made by law, which gives, under such circumstances, a personal remedy against the debtor by means of a civil suit. Ample provision is made for the apprehension and prosecution of criminals, and for the punishment of those who violate the various provisions of the intercourse laws; but the subject to which your inquiry refers—that of a personal proceeding, to recover debts contracted in the United States, by those who subsequently take refuge in the country beyond the limits of the jurisdiction of their courts—does not appear to have been acted upon by the legislature.

H. D. GILPIN.

To the POSTMASTER GENERAL.

 COMPENSATION OF DISTRICT ATTORNEYS.

District attorneys are not entitled to any compensation over and above their annual salary and stated fees for any services whatever rendered by them as such officers in the prosecution of offenders.

But where, under special instructions, district attorneys render services of various sorts, necessary to discover criminals and in procuring adequate evidence, for such services they may be allowed an adequate compensation by the proper department.

ATTORNEY GENERAL'S OFFICE,

April 17, 1840.

SIR: I had the honor to receive your letter of the 16th of March, in which you inquire whether the fourth section of the act of 3d of March, 1817, which allows the district attorney of the United States for the district of Indiana an annual sum of

Compensation of Quartermaster of Marine Corps.

\$200, in addition to his stated fees, as a full compensation for all extra services, is to be considered as precluding the allowance of a claim which he makes for extra services rendered by him in the prosecution of postmaster Keen for embezzling certain public money.

In reply, I have to state that, in my opinion, no other compensation than the stated fees and annual salary above mentioned can be allowed to the district attorney for any services whatever, which are necessarily rendered by him as a public officer, in the prosecution of an offender. It may, however, happen, and frequently does, that in criminal cases of this nature, preliminary inquiries and services of various sorts necessary to discover the criminal, and procure adequate evidence, must be made at much trouble and expense. Such services I do not think a district attorney can be expected to render, without special instructions and reasonable remuneration; nor do I consider them as falling within the class for which the above-mentioned law intended to provide. For services, therefore, of this nature, rendered by the district attorney of Indiana, previous to the passage of the third section of the act of the 3d of March, 1839, I think a reasonable allowance may be made by the head of the proper executive department.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

COMPENSATION OF QUARTERMASTER OF MARINE CORPS.

Since the 3d of March, 1835, quartermasters have not been allowed any extra compensation on account of disbursements for public supplies.

ATTORNEY GENERAL'S OFFICE,

April 17, 1840.

SIR: I had the honor to receive your letter of the 28th of February, enclosing the communication of Judge McLean, and other papers connected with the claim of the representatives of the late quartermaster of the marine corps, for an allowance of one per cent. commission on certain purchases of public supplies made by him subsequent to the 3d of March, 1835.

I have given the communication of Judge McLean the most

Sales of Choctaw Reservations.

attentive consideration, but I am unable to come to the opinion that the claim in question ought to be allowed. I am led to this, from a consideration of the terms of the act of Congress of the 30th June, 1834, which have not been adverted to by Judge McLean. The fifth section of that act declares that "the officers of the marine corps shall be entitled to and receive the same pay, emoluments, and *allowances*, as are now, *or may hereafter be*, allowed to officers of similar grades in the infantry of the army." Previous to the 3d March, 1835, the allowances of officers of the army, of grades similar to a quartermaster in the marine corps, embraced a commission of one per cent. on purchases; and that allowance was accordingly made to Major Weed. On the 3d of March, 1835, Congress prohibited extra allowances or compensation in any form to an officer of the army, on account of the disbursing any public money appropriated by law, during that session, *for the purchase of public supplies* of any description. This law, in accordance with an opinion given by my predecessor, (Mr. Butler,) on the 7th of March, 1835, has ever been considered as a permanent regulation. In conformity, therefore, with this law, no commission similar to that claimed on behalf of Major Weed has been allowed to any officer of like grade in the army—or, indeed, to any officer whatever. It cannot, then, be allowed under the act of the 30th of June, 1834, to the quartermaster of the marine corps, for it was obviously the object of that act to make the allowance to infantry of the army and to the marine corps exactly the same; any changes in the allowances to the latter being made to conform to those which might take place in the former, whether they increased or lessened the compensation the officer was thus to receive.

H. D. GILPIN.

To the SECRETARY OF THE NAVY.

SALES OF CHOCTAW RESERVATIONS.

Where a Choctaw reservee conveyed his reservation to D., in trust, to sell and apply the proceeds to the payment of a debt owing by the reservee to A. and B., who thereupon sold a portion of the land, and with the proceeds paid a part of the said debt; and, at this stage of the affair, the reservee died, leaving two

Sales of Choctaw Reservations.

children, whose guardian, under pretence that he was acting for the children, bought the residue at a sum far below its value, who, after taking H. into partnership with him, conjointly with him sold the land to Banks and Lewis, without the consent of the President, and refused to pay over any part of the proceeds to said children—~~decided~~; that the President ought not to give his approval to the sale to said Banks and Lewis, as it would probably deprive the children of their inheritance.

ATTORNEY GENERAL'S OFFICE,
April 18, 1840.

SIR: I had the honor to receive your letter of the 24th of March, enclosing two reports from the Commissioner of Indian Affairs, relative to the application of Messrs. Banks and Lewis for the consent of the President of the United States to a sale to them of part of a reservation made to Jack Pitchlynn by the Choctaw treaty of the 27th September, 1830; and inquiring whether, in my opinion, this consent ought to be given.

The material facts of the case are as follows: The nineteenth article of the treaty referred to, declares that certain reservations of land were to be admitted; but provides that the several reservations so secured "may be sold with the consent of the President of the United States." In the treaty, no reservation is secured to Jack Pitchlynn; but, in a supplementary article, dated the following day, and ratified as a part of the treaty, the commissioners agree to request that he may be entitled to a reservation of two sections of land. In an opinion given to the War Department by my predecessor, (Mr. Taney,) on the 1st of November, 1831, that supplement is held to be a part of the original treaty; and the reservations mentioned in it are regarded as subject to sale in the manner and on the terms prescribed in the 19th article.

On the 13th of April, 1831, Jack Pitchlynn conveyed the whole of his reservation to William Downing, in trust, to sell and apply the proceeds to pay Abert and Raser a debt he owed them of \$2,428 40, with interest. This conveyance does not appear to have been made with the consent of the President. Downing sold a portion of the land, and applied the proceeds, to the amount of \$2,655 53, to the payment of the principal, and part of the interest of Abert and Raser's debt—leaving, however, \$312 96 of the interest still unpaid. In the mean time, Jack Pitchlynn died, leaving two children; and John

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Pitchlynn, senior, his father, became their guardian. Old Pitchlynn then proposed to Abert and Raser to pay them the balance still due, if they would agree to transfer to him the benefit of the deed of trust; and an arrangement was accordingly made, by which Mr. Abert gave an order to Mr. Downing, the trustee, to sell the residue of Jack Pitchlynn's reservation, for the purpose of satisfying what remained due under the deed of trust. On the 4th of October, Mr. Downing, the trustee, offered for sale the residue of the reservation, which consisted of fractional sectional 30, of township 19, in range 18 east. At the sale, it was proclaimed that the land was to be bought in by old Pitchlynn, for the benefit of his grandchildren, Jack Pitchlynn's heirs. Accordingly, it was sold "to John H. Hand, for John Pitchlynn, senior," for \$1,012—a sum far below its value. This sale also appears to have been made entirely without the consent of the President. On the day of the sale, an agreement was entered into between old Pitchlynn and Mr. Hand, by which it was stipulated that, "in consideration of a note for \$506, given by Mr. Hand to old Pitchlynn, the former was to become, "in every respect, a full and equal partner in the tract of land aforesaid." On the 8th of October, 1834, four days after the sale, Mr. Hand and old Pitchlynn sold the same tract of land to Messrs. Banks and Lewis for the sum of five thousand dollars, cash in hand. This sale, also, was made without the consent of the President, though no doubt is expressed as to its having been made *bona fide*, and that the purchase-money was a fair equivalent. It would have left for the heirs of Jack Pitchlynn the sum of \$4,686, after discharging his debt, principal and interest. No portion of this sum has ever been paid or accounted for by old Pitchlynn to his grandchildren. On the 12th of October, 1837, he was superseded in his guardianship by the appointment of Grant Lincicum, the uncle of the heirs of Jack Pitchlynn, as their guardian. Lincicum forthwith objected to an approval by the President of the sale to Messrs. Banks and Lewis. This objection he afterwards withdrew, in consideration of receiving the sum of \$1,000, though it is not alleged that he had any legal or competent authority to do so. The heirs of Jack Pitchlynn are still minors, living in the Choctaw country beyond the Mississippi. Old Pitchlynn is dead; and any recourse which

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the children might have against him or his property, may be regarded as desperate.

Upon this state of facts, application is made to the President, by Messrs. Banks and Lewis, to give his consent, pursuant to the 19th article of the treaty, to the sale made to them; and you inquire whether, in my opinion, that consent ought to be given.

In reply, I have the honor to state, that I think it should not be given. It cannot be doubted that the minor children of Jack Pitchlynn are entitled to the full amount of the consideration money of the sale in question, after the payment of their father's debts chargeable upon it. The evident intention of the clause requiring the President's consent to sales which the reservees might make, was to protect the Indian against any injustice or impropriety in the sale. A sale made by Jack Pitchlynn himself, in his lifetime, would have been subject to examination on those grounds, and would have been approved only on satisfactory evidence of its being *bona fide*, and in accordance with the legal and equitable rights of the reservee. Much more must this principle govern the Executive, when the legal and equitable rights of minor Indian children, residing beyond the Mississippi, are to be affected by the decision. Yet the approval which is now asked for would not only certainly, and, as I think, unjustly interpose a serious obstacle in the way of these minors while prosecuting their claims to their inheritance, but would probably, in point of fact, deprive them totally of every portion of that inheritance. I cannot think that there is any thing in the treaty which would, under such circumstances, make it obligatory on the President to give his consent to the sale; on the contrary, I am of opinion that the clear intention of the treaty authorizes him to withhold it.

The only grounds on which the request for his approval appears to be strongly urged are, that the purchase by Messrs. Banks and Lewis was *bona fide*; the price given was the fair value of the land; and that price was actually paid by them to old Pitchlynn and Mr. Hand. To these reasons it may be answered, in the first place, that if a refusal on the part of the Executive to approve the sale involves them in the risk of losing their purchase-money, his consent will, on the other

Duty of Accounting Officers respecting Claim of William Otis.

hand, in all probability, subject the minor children to the loss of every portion of their inheritance. But, in addition to this, it is to be observed that the purchase was voluntarily made by Messrs. Banks and Lewis, with a full knowledge of the consent of the President being necessary to give a valid title to the land in question. It was in their power so to have made their contract of purchase as to leave the actual payment of the money dependent on their receiving a valid title. It was well known that the land in question was the reservation of Jack Pitchlynn, and therefore subject, when sold, to the equally well-known provisions of the treaty regulating the sale of reservations. It was also obvious that, by the death of Jack Pitchlynn, his interest had passed to his minor children; and, therefore, that any purchaser was especially bound to look to the legality and correctness of all the intermediate proceedings by which his title might be affected. He could have no just grounds to complain of any difficulty arising from a neglect to do so.

The objections which I thus entertain, for the reasons stated, to an approval of the sale, make it unnecessary to express an opinion on the other ground of objection taken by the Commissioner of Indian Affairs,—that the sale in question is not such a one as is contemplated by the nineteenth article of the treaty; and that, therefore, the laws of the State of Mississippi should be left to operate on the case, without any interference between the parties on the part of the Executive.

H. D. GILPIN.

To the SECRETARY OF WAR.

DUTY OF ACCOUNTING OFFICERS RESPECTING CLAIM OF WILLIAM OTIS.

Although it is doubted whether an account which has been finally adjusted, settled, and closed, ought to be reopened, the claim in behalf of William Otis, late collector of customs at Barnstable, not having been fully settled, may now be settled without violating such a rule.

ATTORNEY GENERAL'S OFFICE,

April 20, 1840.

SIR: I have examined the documents relative to the case of William Otis, deceased, late collector of the customs for the

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district of Barnstable, which were transmitted with the letter of the First Comptroller of the Treasury, dated the 27th of March; and have now the honor to state that, in my opinion, the sum reported by the accounting officers to be still due, may be paid in pursuance of the provisions of the act of Congress of the 2d of March, 1829. That act directed those officers to audit and settle his accounts upon principles of justice and equity; appropriated a sum of money sufficient to discharge the amount that they might decide to be due; and directed its payment upon their decision being sanctioned and approved by the President.

Shortly after the passage of this act, an account was presented by Mr. Otis, of which a portion was admitted and paid with the sanction and approval of the President. This, however, was not stated to be, or regarded as, a final settlement under the act; on the contrary, not long afterwards an additional allowance of \$3,120 35 was admitted, approved by the President, and paid; and a still further allowance has been made by the present accounting officers, and sanctioned and paid in the same manner. The present report of the First Comptroller presents to the President for his approval an item of \$10,585 67, which is stated to be a final decision on the claim of Mr. Otis, and a final settlement of his accounts, in pursuance of the act.

That Mr. Otis is entitled to the allowance in question, "upon principles of justice and equity," does not appear to be doubted. The accounting officers and the Secretary of the Treasury concur in this opinion from the testimony produced. The statement of the case, as exhibited in the report of the First Auditor, dated 25th of January, 1840, is, I think, conclusive to show that the item in question should never have been disallowed. The only ground on which a doubt is expressed, as to the propriety of making the allowance, arises out of the fact that the claim was rejected by the First Auditor, when originally presented in 1829. This is regarded as a final decision, with which the present Auditor thinks it would be improper to interfere. The First Comptroller, on the other hand, is of opinion, that as the account has never been finally adjusted or settled, there has been no such decision as precludes an al-

Testimony of Negroes before Courts-Martial.

lowance of this item, if justly due to the claimant. To this view may be added the facts, that the decision of the former Auditor does not appear to have been regularly or explicitly confirmed by the Comptroller, although it is supposed to have been assented to by him; that it does not seem to have been submitted to or passed upon by the President, as the act of Congress requires, before the proceedings under it can be considered as final; and that, since it was made, evidence has been produced to show that at the time the former Auditor examined the account, Mr. Otis was laboring under a mental incapacity to manage his business.

It may be reasonably doubted whether an account which has been finally adjusted, settled, and closed, ought to be reopened, without very strong circumstances to warrant such a course. But the present case does not fall within that rule. The amount in question certainly was not closed, or even finally adjusted; it is doubtful whether even the item in dispute can be considered as formally rejected, under the act which submitted it to the accounting officers and the President. While the account thus remained unclosed, the particular items were subject to examination.

I am, therefore, of opinion that the claim, being founded "on principles of justice and equity," ought to be sanctioned and approved by the President; with the understanding that the present decision is a final one upon the whole claim of Mr. Otis, and that no further allowance be made under the act of Congress above referred to.

H. D. GILPIN.

To the PRESIDENT OF THE UNITED STATES.

TESTIMONY OF NEGROES BEFORE COURTS-MARTIAL.

The Executive will not set aside the proceedings of courts-martial merely because they have admitted the testimony of negroes or made other mistakes, though objected to, where it appears, upon the whole case, that justice has been done and that the verdict is substantially right.

ATTORNEY GENERAL'S OFFICE,

April 27, 1840.

SIR: I had the honor to receive your letter of the 20th instant, enclosing a copy of that of the Honorable J. Taliaferro,

Construction of a Contract for Army Supplies.

of the House of Representatives, together with the record of the proceedings of the court-martial convened for the trial of Lieutenant George Mason Hooe, on board the United States ship *Macedonian*, in the bay of Pensacola, on the 18th of March, 1839, and the opinion of the attorney of the United States for this district thereon.

In reply to your request for my opinion on the point submitted by Mr. Taliaferro—that the proceedings and judgment of the court-martial ought to be set aside, on the ground that it admitted the testimony of two negroes on board the vessel, who were produced and examined as witnesses, notwithstanding an objection made thereto—I have to say, that on a careful examination of the record, I find that the testimony objected to is in no respect material to the finding of the court. That testimony related to the second charge, of which the accused was entirely acquitted; and also to the fourth specification in the first and second charges, the finding in regard to which was fully sustained, in all particulars, by witnesses whose competency was not denied. Indeed, the only fact found by the court, under any portion of the charges to which this testimony relates, is the punishment of a person on board the ship by direction of Lieutenant Hooe—a fact mentioned by many witnesses, and not at all denied in the defence, which rests not upon the fact itself, but the authority of the accused to direct the punishment. If, therefore, we adopt the well-established and reasonable rule laid down in regard to similar applications in common-law proceedings, that “where, upon the whole case, justice has been done, and the verdict is substantially right, no new trial will be granted, even though there may have been some mistakes committed,” sufficient justification for assenting to the present application will not be found. This makes an inquiry unnecessary in regard to the objection itself.

H. D. GILPIN.

To the SECRETARY OF THE NAVY.

CONSTRUCTION OF A CONTRACT FOR ARMY SUPPLIES.

Where a contractor for army supplies agreed to furnish for the army, upon the requisition of the commandant, a supply of provisions for six months in advance,

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at Detroit, and for nine months at Mackinac, and was required by the commanding officer to deposit more rations than were required for six months' supply of the troops stationed at Detroit, and ten per centum in addition for contingencies; and the question of the rate of compensation for the excess having been passed upon by a court and the matter sent to the accounting officers to be adjusted on principles of justice and equity, by an act of Congress requiring them to recognise the judicial decision—DECIDED, that the contractor must be held to supply at his contract price the amount necessary for six months' supply at Detroit, and nine months' supply at Mackinac, and ten per centum besides for contingencies, and no more, and that for the excess he should be allowed the fair market value.

ATTORNEY GENERAL'S OFFICE,

April 30, 1840.

SIR: I have had the honor to receive your letter of the 22d November, addressed to the late Attorney General, requesting an opinion relative to the proper construction of that part of the act of Congress of 2d of July, 1836, passed for the relief of James Thomas, which directs the accounting officers to be governed by the judicial decision of the district judge of the United States for the southern district of New York.

It appears that Colonel Thomas, on the 26th January, 1816, contracted, among other things, to furnish for the army, upon the requisition of the commandant, a supply of provisions for six months in advance at Detroit, and for nine months in advance at Mackinac. Under this contract the commanding officer required him to deposit 240,000 rations on the 1st of December, 1816, at Detroit, and 180,000 rations on the 1st November, 1816, at Mackinac. On the adjustment of the accounts between Colonel Thomas and the United States, a balance was reported against him by the accounting officers, and a suit was instituted in the district court of the United States for the southern district of New York, to recover the balance so reported to be due. On the trial, Colonel Thomas alleged that the number of rations thus required by the commanding officer was exorbitant, and he claimed to be allowed the market price, instead of the contract price, for all the provisions thus furnished by him, under the requisition of the commanding officer, "beyond what the officer had a right to call for, or the contractor was required to furnish under his contract." To sustain his right to this allowance, he gave in evidence a

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letter of General Macomb, in which that officer states that the number of rations actually required for six months' supply of the troops stationed at Detroit, at the time referred to, was 112,112; but that it was proper to provide for contingencies in addition, and that "for such contingencies ten per cent. ought to be estimated on the amount above stated," making 123,323 rations as the number "required for deposit at Detroit for troops." In charging the jury upon this claim, the district judge decided as follows: "Though a liberal construction ought to be indulged, in respect to the right to call for a deposit of provisions, and the right should not be restrained strictly to what would be sufficient for the number of men actually in service; and though regard ought to be had to the possible necessity of augmenting the forces at those points, and the contract should be so construed as to embrace such contingency; yet the requisition for rations ought to have a fair and reasonable relation to the troops really in service, and the commanding officer cannot make an inordinate requisition on mere conjecture that it may possibly be wanted. The jury were justified in taking the after events into consideration, in determining whether any proper reason or occasion existed for such a requisition. There was evidence in the case, submitted to the jury, that might warrant their finding that the privilege, secured to the government in this behalf, had been unwarrantably used by the commanding officers in their requisitions for deposits."

What the judgment of the court was in this suit, does not appear in the papers before me; but the subject was again brought before the accounting officers of the treasury, by the act of Congress of 2d July, 1836. They were then authorized to adjust and settle the accounts on principles of justice and equity, and, in so doing, to recognise the judicial decision of the district judge, as fixing the true construction of the contract, and the relative rights of the parties under the same. In the progress of this settlement, the accounting officers allowed Colonel Thomas the fair market value, over and above the contract price, of all the rations furnished by him at Detroit and Mackinac, beyond the number which the commanding officer had a right to require to be deposited at those places; and they fixed this number according to the evidence of General Ma-

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comb, which had been obtained and adduced by Colonel Thomas;—that is, they held him bound to furnish, under his contract, the number of rations actually required for the six months' supply at Detroit, and the nine months' supply at Mackinac; and also ten per cent. in addition, for contingencies; but no more. It is, as I understand, upon the correctness of this decision, and its accordance with that of the district judge of New York, that my opinion is now asked.

I have no hesitation in saying that I concur entirely in the construction of the contract which is given by the accounting officers; that is to say, I am of opinion that the contractor was bound to deposite, on the requisition of the commanding officer, not only the number of rations actually needed, but a sufficient quantity to meet contingencies; and that he was also bound, while his contract existed, to issue and deliver them to the United States, to the full extent of this limitation, at the price specified therein, whatever may have been their market value.

There is, however, a view of this case, connected with the matter of fact not directly presented to me, but referred to in the papers submitted, which has so material a bearing on the whole question, that my opinion might be subject to some misapprehension unless I were to advert to it. The point is this: it seems to be alleged (though the fact does not distinctly appear) that the supplies in question were never, in point of fact, delivered to the United States until they were actually issued to the troops; that, though the contractor was bound to *deposite* them, and did actually deposite them at the designated places, yet they were not received by the United States, or considered as their property, but still remained the property of the contractor, at his own risk; he being liable for their loss or injury, at all times previous to their actual issue to the troops. If such be the fact, I am of opinion that the United States could not, after the expiration of the contract, and after the obligation on the part of the contractor to furnish the supplies had ceased, still appropriate to their own use the property remaining in his hands, except at the actual value—that is, at the fair market price. It is true, he would have been bound to deposite it, and also bound to issue supplies up to the close

Payment of Territorial Militia called out, but not Mustered.

of his contract, to the full extent required, including the addition for contingencies; and to do this at his contract price. But I can perceive no right which the United States possess to compel, after the termination of the contract, the delivery of the supplies which they did not need before, which they refused to receive, and which they obliged the contractor to hold and keep at his own exclusive risk. In such a case, the contractor is certainly not bound to deliver them under his contract, without a clear stipulation to that effect, nor at the contract price.

H. D. GILPIN.

To the SECRETARY OF WAR.

PAYMENT OF TERRITORIAL MILITIA CALLED OUT, BUT NOT MUSTERED.

There are no acts of Congress providing pay, rations, and expenses to militia called out by State or Territorial authority, but disbanded without their having been employed or mustered into the service of the United States previous to their dismissal; such cases, as they have arisen, having been, from time to time, specially provided for.

ATTORNEY GENERAL'S OFFICE,

May 1, 1840.

SIR: I had the honor to receive your letter of the 29th ultimo, relative to the payment of the militia called out by the governor of Iowa, at the requisition of the marshal, on account of certain differences that had arisen between the State of Missouri and the Territory of Iowa, relative to the boundary-line between them; and inquiring whether, in my opinion, the act of the 20th April, 1818, authorizes the allowance of pay, rations, and expenses, to the militia so called out, but disbanded without their having been at any time called forth by direction or with the approval of the President, or without their having been at any time, previous to their dismissal, employed or mustered into the service of the United States.

The act which authorizes and regulates the pay of the militia, passed on the 2d January, 1795, provides by its first section, "that from and after the passing of that act, the allowance of bounty, clothing, and pay, to the non-commissioned officers, musicians, and privates of the infantry and cavalry of the mili-

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tia of the United States, *when called into actual service*, shall be at the rates per month" therein stated. The third section of the same act further provides, "that whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the place of battalion, regimental, or brigade rendezvous; allowing to each non-commissioned officer, musician, and private soldier, a day's pay and rations for every fifteen miles from his home to such place of rendezvous, and the same allowance for travelling home from the place of discharge." On the 20th of April, 1818, an act was passed entitled "An act to defray the expenses of militia *when marching to places of rendezvous*." It is in the following words: "That the expenses incurred, or to be incurred; by marching the militia of any State or Territory of the United States to their places of rendezvous, in pursuance of a requisition of the President of the United States, or which shall have been, or may be, incurred in cases of calls made by the authority of any State or Territory, which shall have been or may be approved by him, shall be adjudged and paid in like manner as the expenses incurred after their arrival at such places of rendezvous, on the requisition of the President of the United States: *Provided*, That nothing herein contained shall be considered as authorizing any species of expenditure, previous to arriving at the place of rendezvous, which is not provided *by existing laws* to be paid for after their arrival at such place of rendezvous."

It will be perceived that the pay thus allowed is confined, by the express terms of the act of 1795, to militia who shall be called into the actual service of the United States; it will also be perceived that the payment is confined to compensation while they are in such actual service, with an allowance of a day's pay and rations for every fifteen miles the officer, musician, or soldier, may travel between his home and the place of rendezvous; but no provision whatever is made for defraying the expenses which must be incurred of necessity by the marching of the troops previous to their arrival at the place of rendezvous, or before they are actually mustered into service. To provide for this omission, the act of 20th April, 1818, was passed; and its object is declared in its title to be "to defray

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the expenses of the militia when marching to places of rendezvous." To guard against any improper allowance under the denomination of expenses, the proviso was added, by which it was declared "that the act in question was not to be considered as authorizing any species of expenditure previous to arriving at the place of rendezvous, which was not provided *by existing laws* to be paid after their arrival at such place"—that is to say, no other expenses than those necessarily incident to the marching of troops, after they are in the actual service of the United States.

That such was the sole and limited object of the act of 1818, is, I think, to be deduced, as well from the evident propriety of supplying the omission in the previous law, as from the declaration contained in the title and the limitation imposed by the proviso.

The only portion of the act which would seem to give rise to a doubt on the correctness of this construction, is the phrase which alludes to expenses incurred in cases of calls made by the authority of any State or Territory, which shall have been, or *may be*, approved by the President. I think, however, that this expression is perfectly consistent with what I suppose to be the intention of the act. It has reference only to expenses incurred during the march to the place of rendezvous; and as the pay, subsequent to their arrival at such place, depends on the act which confines it to militia who are mustered into the actual service of the United States, it may be inferred that the previous expenses of the march were limited to the same troops. No act of Congress confers any right to *pay* militia that have been called out by the authority of a State or Territory, even if such call is afterwards approved by the President, unless they shall have been in the actual service of the United States—unless they shall have been mustered into their service; and it can, therefore, be scarcely inferred that the words to which I have adverted are intended to authorize a payment, except in a similar case of *expenses* incurred by the marching of the militia previous to such actual service. It may well happen that the authorities of a State or Territory may deem it a duty to call out the militia on the occurrence of any of the contingencies on which the federal Executive is authorized to do so; and

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that the President, on being informed thereof, may approve such course, and muster them into the service of the United States, without having originally called them forth. In this case the act of 2d January, 1795, had actually allowed their *pay*; and the phrase now referred to meets the previous *expenses*. If so confined, it is entirely consistent with the declared intention of the act of 1818, as well as with the previous provisions, relative to the employment of the militia by the President. Even in that case, however, an appropriation by law would be necessary for the actual payment of the militia so called out. But where it happens that the President never has exercised the authority conferred on him, where the militia were called out solely on the judgment of the executive authority of the State or Territory, without the approval of their employment being asked for or given by the President, and without their having been at any time in the actual service of the United States, Congress would seem to have reserved such a case entirely for their own legislation, in regard as well to the allowance of pay and expenses, as the actual appropriation therefor, rather than to have made it a matter dependent alone on a subsequent approval by the President.

The circumstance which you mention, of the uniform construction heretofore of the law in question, confirms this view of it; and it is strengthened by the course adopted by Congress when they deemed it necessary to pass the special act of 7th July, 1838, to provide for the case of the militia of New York, who were called out by the governor of that State for the protection of the frontier, but never actually mustered into the service of the United States. Indeed, that case may be regarded as affirming this construction more fully, from the fact that there was at the time an unexpended appropriation already made for defraying the expenses connected with the protection of that frontier.

I am, therefore, of opinion that the question proposed by you must be answered in the negative.

H. D. GILPIN.

To the SECRETARY OF WAR.

Verification in Foreign Countries of Applications for Patents.

VERIFICATION IN FOREIGN COUNTRIES OF APPLICATIONS FOR
PATENTS FOR INVENTIONS.

Verifications and depositions in foreign countries to be made under the provisions of the sixth section of the act of July 4, 1836, before patents can issue, should not be made before consuls, but before competent magistrates of the country where they shall be taken, and authenticated by the consul.

Any abrogation of oaths in the patent laws of England will not affect the question here; all conditions requisite to a patent in this country must be complied with according to the laws of Congress.

ATTORNEY GENERAL'S OFFICE,
May 12, 1840.

SIR: I had the honor to receive your letter of the 4th instant, enclosing a communication from the Commissioner of Patents, and asking whether, in my opinion, the oath required to be taken by an applicant, under the provisions of the sixth section of the act of the 4th of July, 1836, before a patent can be issued to him, may be administered by a consul of the United States, and particularly the consul who is also an agent of claims at Paris.

In reply, I have to state that I am aware of no law which confers on consuls the general power of administering oaths, though they are authorized to *authenticate* depositions made in foreign countries. I am, therefore, of opinion that the oath should not be administered by the consul, but by a competent magistrate of the country where it is taken; and that the deposition so made should be verified by the official certificate or authentication of the consul.

The Commissioner of Patents also inquires whether the provision of the act of the 4th of July, 1836, above referred to, is "sufficiently complied with in *England*, by a solemn declaration" pursuant to the act of 6 William IV, entitled "An act to repeal an act of the present session of Parliament, entitled 'An act for the more effectual abolition of oaths and affirmations taken and made in the various departments of the state, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extrajudicial oaths and affidavits;' and to make other provisions for the abolition of unnecessary oaths." I have not seen the British statute here referred to, but presume, from its title, that it substitutes, in cer-

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tain cases in England, a declaration for the oath or affirmation previously required by the laws of that country. I am of opinion that this change cannot sanction any deviation from the requisitions of the act of Congress above referred to, and that the question proposed must be answered in the negative.

H. D. GILPIN.

To the SECRETARY OF WAR.

PAYMENTS DIRECTED BY CONGRESS—TO WHOM TO BE MADE.

Payments directed by Congress to be made to M. and T. should be made by the Secretary of the Treasury to them or their constituted attorney, notwithstanding the interposition of claims by third persons grounded on assignments, insolvent or other proceedings, anterior to the passage of the act directing the payment.

Accounting officers cannot, in the innumerable cases in which Congress directs specific sums to be paid to individuals, examine and settle previously existing claims and credits against such individuals.

ATTORNEY GENERAL'S OFFICE,

May 13, 1840.

SIR: I had the honor to receive your letter of the 7th instant, enclosing a report of the First Auditor, and certain papers relative to the payment of \$2,757 23 to Robert Milnor and John Thompson, as directed by the act of Congress passed on the 2d instant; and inquiring whether the money should be paid to the persons named in the act, or the portion of Robert Milnor to his trustee.

It appears that Robert Milnor and John Thompson, who were gaugers in the custom-house at Philadelphia, jointly performed, after the passage of the act of 4th of July, 1836, certain services in regauging wines that were in store, which did not form any necessary part of their official duty, and for which no compensation was provided by law or received by them. For these services they applied in February, 1838, to Congress, for compensation; and the act of 2d of March, 1840, was passed for the purpose of giving it. That act directs the Secretary of the Treasury to pay Robert Milnor and John Thompson the sum above mentioned, out of any money in the treasury not otherwise appropriated. Immediately on the passage of the act, G. W. Metz, as trustee of Robert Milnor, gave notice in writing to

Payments directed by Congress—To whom to be made.

the First Auditor, that Mr. Milnor had made an assignment to him of his real and personal estate, and that, as his trustee, he claimed to receive the money to be paid him under the act. It appears, by a certified copy from the records of the court of common pleas of Philadelphia, that Mr. Milnor had applied on the 24th of December, 1838, for the benefit of the insolvent laws; that on the 11th of January, 1839, he had assigned all his property to Mr. Metz, as trustee, for the benefit of his creditors; and that he stated, among the property so assigned, "a claim on the government of the United States for about \$3,774 50;" but no further statement is given of the nature of the claim, nor is there any evidence to show that it was his joint interest in the compensation above mentioned. At the same time, Robert Milnor and John Thompson applied to the Treasury Department, through the Hon. David Petrikin, of the House of Representatives, as their joint attorney regularly constituted, for the payment of the above sum in pursuance of the act of Congress. In this application he denied the authority of the department to appropriate the money otherwise than as directed by the act of Congress, or to recognise a claim derived under an assignment made previously to its passage. He also alleged that the claim so assigned was a different one from that provided for by the act; and that the assigned claim was one made by Robert Milnor alone, and not jointly; and such a claim was in fact made previous to the date of the assignment, and is still pending before Congress. It also appears that the joint claim for which the present act provides was prosecuted solely by Milnor and Thompson, in their own rights; that the trustee made no application to Congress, or to any branch of the government, for the payment to him of Milnor's portion of the joint claim; and that he took no interest therein, and asserted no right thereto, until after the passage of the law by both houses. It also appears that Mr. Metz has received no transfer or assignment of the sum appropriated, and no authority whatever to act on behalf of the persons named in the law, since its passage, but that such transfer and authority are expressly denied and withheld.

In reply to your inquiry, I have the honor to state that, in my opinion, there is no authority in the Treasury Department

Payments directed by Congress—To whom to be made.

to make payment, except in accordance with the explicit directions of the act of Congress. Any other course would necessarily involve the department in the investigation of facts, and an examination of legal rights under the local statutes of Pennsylvania; in regard to which there appears to be a diversity of opinion between the parties, and which ought to be left to the settlement of the proper judicial tribunal. It would also give to the language of the act a meaning different from its plain import, which was to confer, at the time of its passage, on the persons actually named, the gratuity to which they had no legal claim. For the accounting officers to undertake, in the innumerable cases in which Congress directs specific sums to be paid to individuals, to examine and settle previously existing claims of credits against such individuals, instead of pursuing the plain directions of the act, would have the effect of interfering with the legislation of Congress in a manner not warranted, in my opinion, by any existing law.

Nor does it interfere in any way with the legal rights of such claimants. They can look to the fund, in whose hands soever it may come by virtue of the act of Congress; it is held subject to their legal rights; and if they can establish the existence of these, the sum can be recovered, with more certainty of justice being done to all parties in interest, than by means of an extrajudicial decision of the Treasury Department, at variance with the language and apparent intention of an act of Congress.

I am, therefore, of opinion that the Treasury Department is not authorized to pay the sum appropriated to any other person than those directed by the act of Congress—namely, Robert Milnor and John Thompson, or their duly constituted attorney. In this case, however, as in other similar ones, on which the opinions of my predecessors have been given, it is proper to observe, that where an equitable claim is interposed, which the department may regard as entitled to consideration, notice should be given to the claimant of the time when payment is to be made, so that he may not be precluded from the opportunity, if he desire it, to sustain his right by a judicial decision.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Compensation of Marshals and Certificates of Judges.

COMPENSATION OF MARSHALS AND CERTIFICATES OF JUDGES.

Where it is the settled practice of the court to procure the attendance of witnesses by the service both of the process of summons and subpoena, and an order issues to the marshal to summon witnesses, that officer is entitled to an allowance of fifty cents for performing the order, and the stated compensation for serving the summons and subpoena. He cannot disregard the orders or process issued by the court, even though they are superfluous; but must execute such as shall be issued to him in the ordinary practice, and for which he is entitled to the prescribed fees at the hands of the government.

The taxation of the court, and the allowance and certificate of the judge, are conclusive upon the accounting officers when the service or purpose is enumerated in the act of Congress, and the sum allowed therefor is not exceeded.

The marshal cannot be allowed more for the service of a summons, where a subpoena and summons shall have been issued to him to obtain the attendance of a single witness, than the sum prescribed for summoning a single witness.

ATTORNEY GENERAL'S OFFICE,

May 16, 1840.

SIR: I had the honor to receive your letter of the 26th of February, enclosing a communication from the First Comptroller, and requesting an opinion on certain points connected with the compensation of the marshal of the southern district of New York for summoning witnesses.

These inquiries involve the proper construction of certain provisions in two acts of Congress. The second section of the act of 8th May, 1792, provides that the forms of writs, executions, and other processes, except their style, and the forms and modes of proceeding in suits, in those of common law, shall be the same in each State, respectively, as were used in the year 1789 in the supreme courts thereof; subject, however, to such alterations as the courts of the United States, respectively, shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same. The first section of the act of 28th February, 1799, provides that the compensation to the marshals of the several districts of the United States, for "the service of any writ, warrant, attachment, or process, issuing out of any court of the United States, shall be two dollars;" and also that their compensation for "actually summoning a witness shall be fifty cents."

Compensation of Marshals and Certificates of Judges.

It appears that it is an established mode of proceeding in suits in the district court of the United States for the southern district of New York to issue out of the court a writ of subpœna to be served by the marshal, and also a summons, in addition thereto, and distinct therefrom. This double process, I understand, is the usual and established mode of proceeding adopted in all suits depending in that court, and distinctly recognised and allowed as such by the district judge.

In your letter to my predecessor, Mr. Butler, dated 12th September, 1837, the inquiry was made, whether or not this writ of subpœna was included within the clause of the act of 8th May, 1792, which allows the marshal two dollars for the service of each writ, warrant, attachment, or process; and, also, whether or not the accounting officers were bound to credit the marshal with the sum allowed therefor, upon the allowance and certificate of the district judge, made in accordance with the provisions of the fourth section of the same act? The opinion of Mr. Butler—that both inquiries should be answered in the affirmative—having been deliberately expressed, and heretofore communicated, I did not consider it necessary to re-examine that question, or to do more than express my assent thereto; which was done in my letter of the 14th of February last.

In reply to the additional inquiries on the same subject, which are now made by the Comptroller in his communication enclosed in your letter of the 26th February, I have to express the following opinion:

1. The additional and distinct order to the marshal, directing the actual summons of the witness, is not included within the provision making compensation for the service of the writ of subpœna; it being specially provided for by the specific allowance of fifty cents for performing that order.

2. The marshal may be rightfully allowed his compensation for the due service and return of the writ of subpœna, and, also, his compensation for actually summoning the witness; it being, of course, understood that the double process comes to his hands, and the execution of each is required of him under the established practice of the court.

3. If this double process is issued under the established and

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recognised practice of a court of the United States, it is legal process, which the marshal is not at liberty to disregard. Both orders must be obeyed by him; his acts must be done, and his returns made in compliance with each; and the accounting officers are bound to recognise and allow the prescribed compensation for each, even though the service of the subpœna, or the summons, separately, might be sufficient to secure the attendance of the witness.

4. The taxation of the court, and the allowance and certificate of the judge, are conclusive upon the accounting officers when the service or purpose is enumerated in the act of Congress, and the sum allowed therefor is not exceeded; nor can the allowance be considered "as palpably excessive," if it is in accordance with the rules of court and established modes of proceeding, even though it be admitted that a part of the service, and, consequently, of the compensation, might be usefully dispensed with.

5. If a writ of subpœna and summons be directed to the marshal in order to obtain the attendance of a single witness, and both be duly executed and returned, he cannot claim to be allowed more for the service of the summons than the sum prescribed for actually summoning a single witness.

In expressing these opinions, in addition to those heretofore given by Mr. Butler on the same questions, arising out of the communication of the Comptroller, I beg to observe, that I entertain strong doubts whether Congress contemplated the issuing or service of a writ of subpœna, in addition to the summons of a witness, when the act of 28th February, 1799, was passed; and I am also at a loss to perceive the necessity of a double process for securing the attendance of a witness, which adds so much to the costs that parties must incur. But, notwithstanding these views, I do not think that the marshal is at liberty to disobey or neglect to execute any lawful process which, as the executive officer of the court, he may be required, under its rules or established modes of proceeding, to perform; or that he should be deprived of compensation for such services, on the ground that they are unnecessary or superfluous. Such a doctrine would be, in fact, to make the practice of the courts of justice dependent on the accounting officers. The proper

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mode, in my opinion, of providing a remedy, is by the action of the legislature, or the courts themselves; nor do I see any difficulty, as regards this particular subject, in calling it specially to the notice of the court, who are fully authorized to make such alterations in their modes of proceeding as they may deem proper. Should you think it expedient, the attorney of the United States might be directed to take this course; and there can be little doubt that, unless there is good reason to the contrary, the court would make such change as might be necessary to save the parties from any useless accumulation of costs.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

ERRONEOUS PAYMENT FOR PRINTING LAND PATENTS.

Where the contractor for parchments for land patents delivered a portion of them in printed form and received payment therefor, augmented by the price of the printing—DECIDED, that the amount thus erroneously paid may be deducted from other sums yet due him.

The contractors for the printing of parchments cannot be paid for such printing; nor are they entitled to the amount thus overpaid to the contractor for parchment.

ATTORNEY GENERAL'S OFFICE,

May 20, 1840.

SIR: I had the honor to receive your letter of the 7th instant, in which you state that "John T. Sullivan contracted to deliver to the General Land Office one hundred thousand pieces of parchment, for land patents; and that Blair and Rives contracted to print blank patents on that number of parchments; that Mr. Sullivan has delivered a portion of the parchments in the printed form, instead of in blank, as his contract required; and that for part of the number thus delivered, he has been paid by the Commissioner the additional price of the printing, under the circumstance and apprehensions set forth in the papers." Upon this statement of facts, you request my opinion in reply to the following questions:

1. Can the sum paid to him (Mr. Sullivan) for printing, if erroneously paid, be deducted from other sums due to him?

Payment of the Pension granted to Mary Updegraff.

2. Can Messrs. Blair and Rives, under their contract, claim compensation for printing not done by them, and rendered unnecessary to be done by the delivery of the parchment already printed?

3. Are they entitled to the amount paid to Mr. Sullivan for printing, if it is decided he should refund what he has received on that account?

In reply, I have the honor to state that, in my opinion, the first question ought to be answered in the affirmative; if any sum has been erroneously paid to Mr. Sullivan, it can properly be deducted from other sums subsequently becoming due to him. The second and third questions must, in my opinion, be answered in the negative. Although I do not find the contract of Messrs. Blair and Rives among the papers submitted to me, yet I presume it only provides for the payment of work actually executed by them; and therefore no compensation ought to be paid for printing not so done, either directly from the treasury, or out of any sum that may be refunded by Mr. Sullivan.

I have examined the documents submitted with your letter, and find nothing in them to vary my answers to the above questions. They certainly present several difficulties, arising out of the error and misapprehension of one of the clerks in the department, which is referred to in your letter to this office of the 8th of July, 1839. But as the opinion of my predecessor has been expressed in his communication of the 17th of July, 1839, on the principle of these, and as it appears that several of the others have been decided by the department in the course of the transactions, I have deemed it unnecessary to re-open the subject by any expression of my views, except upon the points presented by you.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

PAYMENT OF THE PENSION GRANTED TO MARY UPDEGRAFF.

Where an act of Congress directed the Secretary of War to place the name of a widow of a revolutionary soldier, who was a pensioner, upon the roll of pensions, at the same rate which her husband received, to commence at a date ante-

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cedent to the passage of the act; and it is discovered that she actually died before the passage of the act, leaving children surviving—**DECIDED**, that the payment be made to the children, according to the provisions of the act of the 2d March, 1829.

The shares of any absent children should be reserved until the right of the others to take as survivors shall have been established.

ATTORNEY GENERAL'S OFFICE,*May 25, 1840.*

SIR: I had the honor to receive your letter of the 21st instant, requesting my opinion relative to the construction of the act of 3d of March, 1839, granting a pension to Mary Updegraff.

That act provides "that the Secretary of War be directed to place the name of Mary Updegraff, widow of Isaac Updegraff, deceased, and late a pensioner of the United States, on the roll of revolutionary pensioners; and pay the same amount of pension per annum which her said husband received in his lifetime; the same to commence and take effect at and from the first of March, eighteen hundred and thirty-one; to be paid out of any money in the treasury not otherwise appropriated."

From the documents submitted by the Commissioner of Pensions, it appears that Mary Updegraff died on or about the 17th of February, 1839, leaving the following named children, who now reside in Pennsylvania, viz: Elizabeth Alexander, Lucretia Beatty, Abraham Updegraff, and Peter Updegraff. The deceased had another son, John Updegraff, who left home twenty-eight years ago, and has not since been heard from.

In reply to your first inquiry—whether "it was the intention of the law to give the pension to the legal representatives, or to the children of the deceased, in case she should not live to apply for the amount provided by the act,"—I have to say, that I consider the language of the law imperative in directing the name of Mary Updegraff to be placed "on the roll of revolutionary pensions," and also in directing the payment of the arrears of pension from the 1st of March, 1831, to the time of her death. The person to whom the payment is to be made not being designated, we must be guided by the legislative regulations relative to the payment of revolutionary pensioners. The second section of the act of 2d of March, 1829, which embraces such of those regulations as are applicable to the present case, provides, that "whenever any revolutionary pen-

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sioner shall die, the Secretary of War shall cause to be paid the arrears of pension due to the said pensioner at the time of his death; and all payments under this act shall be made to the widow of the deceased pensioner, or to her attorney; or, if he left no widow, or she be dead, to the children of the pensioner, or to their guardian, or his attorney; and if no child or children, then to the legal representatives of the deceased."

In accordance, therefore, with these provisions, I am of opinion that the payment should be made to the children of Mary Updegraff.

In reply to your second inquiry, whether "the four children known to be living are to receive all that is due; or whether a fifth part is to be reserved, in case application should be made by John Updegraff, or his legal representatives, if he is dead;" I have to say that, in my opinion, the share in question should be reserved. Although the lapse of time is sufficient to raise strong probability of the death of John Updegraff, yet the subject is one of which the decision properly belongs to the judicial tribunals of the State of Pennsylvania. If the proper court of probate shall be satisfied of the fact, after the usual mode of proceeding in such cases, and shall see fit to grant letters of administration, the department would be then justified in regarding him as dead, but not otherwise.

H. D. GILPIN.

To the SECRETARY OF WAR.

ADDITIONAL ALLOWANCES TO CONTRACTORS FOR TRANSPORTING MAILS.

The acts of 3d March, 1825, and 2d July, 1836, do not authorize the payment of additional compensation to contractors for transporting the mail in cases where the time of the transit only is changed, even though additional conveyances shall be required, but where the mail is carried between the same *termini* no oftener, and there is no increase of expedition on the route.

The act of 2d July, 1836, provides for the manner in which changes are to be made in the terms of any existing contract, other than those having reference to additional service or increase of expedition.

ATTORNEY GENERAL'S OFFICE,
June 1, 1840.

SIR: I had the honor to receive your letter of the 30th May, requesting my opinion relative to the construction of certain

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clauses in the forty-third section of the act of the 3d of March, 1825, and the twenty-third section of the act of 2d July, 1836, as applicable to the contract for carrying the mail between Fredericksburg and Washington city.

The clause in the act of 3d March, 1825, provides that no additional allowance shall be made by the Postmaster General to a contractor or carrier of the mail, on any route, beyond the amount stipulated in the contract entered into for the transportation of the mail on such route, unless additional service shall be required; and then, no additional compensation shall be allowed to exceed the exact proportion of the original amount to the additional duties required. The act of 2d July, 1836, modified this provision by expressly declaring, in the twenty-third section, that no extra compensation shall be made to any mail contractor, so as that the compensation for additional regular service shall exceed the exact proportion which the original compensation bears to the original services stipulated to be performed; and no extra allowance shall be made to any contractor, by the Postmaster General, for an increase of expedition in the transportation of the mail, unless thereby the employment of additional stock or carriers by the contractor shall be rendered necessary; and in such case, the additional compensation is never to bear a greater proportion to the additional stock or carriers rendered necessary, than the sum stipulated in the original contract bears to the stock and carriers necessarily employed in its execution. These provisions authorize additional compensation, in a certain proportion, to a contractor or carrier on any designated route, when he is required to perform an additional service on that route, or when an increase of expedition thereon is effected by the employment of additional stock.

In the case submitted by you, I understand the facts to be, that the contractors on the route between Fredericksburg and Washington now transport the mail daily, between each place, going and returning; the mail from the south being brought from Fredericksburg in the same steamboat which conveys the mail from the north to that place. They propose to change their hours, so that the mail from the south shall leave Fredericksburg before the mail from the north arrives there, which

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will require the employment of another steamboat on the same route. There is in this no performance of additional service in the transportation of the mail; it is carried no oftener than it was before the change; nor is there any increase of expedition on this route, the same time exactly being required as heretofore. It is, in fact, a mere change of hours; and though this may require the employment of additional means, it is not, in my opinion, a case for which provision is made in either of the clauses to which I have referred. It would be giving a very broad construction to include within them a change of hours alone, without an increase either of the service performed, or the speed required by the original contract. Had the law authorized the Postmaster General to increase the compensation to a contractor, in the prescribed proportion, in every case where the employment of additional means was requisite, there could be no difficulty in the present instance; but not only is this not the case, but there is another clause in the act of 2d July, 1836, which expressly provides for the manner in which changes are to be made in the terms of any existing contract, other than those having reference to additional service or increase of expedition.

I am therefore of opinion that the circumstances of the case, as above stated, are not such as to bring it within the provisions of the existing laws to which I have referred.

H. D. GILPIN.

To the POSTMASTER GENERAL.

ERROR IN PROCEEDINGS BEFORE COURTS-MARTIAL.

It is a fatal error in proceedings before courts-martial for the president to omit to administer an oath or affirmation to the judge advocate before proceeding to trial.

ATTORNEY GENERAL'S OFFICE,
June 9, 1840.

SIR: I had the honor to receive your letter of the 6th instant, enclosing the record of proceedings of a court-martial held on board the sloop-of-war John Adams, in the month of October last, in the case of Midshipman John J. Guthrie, and requesting my opinion as to their legality as therein set forth.

Error in Proceedings before Courts-Martial.

In reply to your inquiry, I have the honor to state that, in my opinion, the proceedings of the court-martial, as set forth in the record, are materially defective.

The thirty-sixth article of the rules and regulations enacted by Congress for the government of the navy, distinctly requires that the president of every court-martial shall administer a certain oath or affirmation therein set forth, to the judge advocate, before proceeding to trial. The justice and propriety of this, whether the prosecution of the accused or his defence is considered, are not less apparent than its necessity in point of law. There is nothing whatever in this record which gives reason to believe that this requisition was complied with in the present case. I consider its omission to be fatal.

H. D. GILPIN.

To the SECRETARY OF THE NAVY.

ERROR IN PROCEEDINGS BEFORE COURTS-MARTIAL.

It is error in proceedings before courts-martial to receive evidence after the court has been cleared for deliberation.

In the case under consideration, where the jurisdiction of the court was called into question on account of the early date of the enlistment, the record ought to have contained authentic evidence of the terms and period of the enlistment, that the revising officer might judge whether or not the court had jurisdiction.

It is not sufficient to return the inferences or conclusions of courts-martial, nor mere statements of the evidence, or books or papers inspected; but the evidence itself on which they based judgment must be returned.

It is improper for the revising authority to make any decision in regard to the effect of a certain act of Congress, in cases where the record is so defective.

ATTORNEY GENERAL'S OFFICE,

June 23, 1840.

SIR: I had the honor to receive your letter of the 18th instant, enclosing the record of the proceedings of a court-martial held on board the United States ship *Fairfield* at Montevideo, on the 5th November, 1839, in the case of John Smith, and requesting my opinion in regard to them.

In reply, I have to state that, in my opinion, the decision of the commanding officer, in not approving of the judgment of the court, was correct; because the record does not exhibit the facts of the case in such form as would have authorized him to

Error in Proceedings before Courts-Martial.

pass upon them. As no sentence of a naval court-martial can, pursuant to the act of Congress of 23d April, 1800, be carried into execution until it is confirmed by the commander of the fleet, or by the officer ordering the court, or, in certain cases, by the President of the United States, it is essential that the record should contain all the evidence; and that, in order to a confirmation, such evidence should sustain, in the opinion of the superior officer, the finding of the court.

In the present case, the accused was charged with disobedience of orders. He declined pleading to the charges, but submitted a plea in bar of the trial, in which he "objected to the jurisdiction of the court, on the ground that his term of service expired previous to the time mentioned in the specifications, and that the said term of service commenced, and was contracted for, before the act of Congress dated 2d March, 1837, entitled 'An act to provide for the enlistment of seamen;' and that, therefore, he was no longer amenable to the laws of the United States for the government of the navy." To sustain this plea, the accused offered no evidence whatever; nor was any such evidence offered to the court in his presence, or while the court was in public session. Immediately after the plea was submitted, it is stated in the record that "the court was cleared to deliberate on the plea of the prisoner, and the muster-book and transfer roll of the United States ship *Fairfield* were produced by order of the court; from which it appearing that the prisoner entered the naval service of the United States previous to the act of Congress approved 2d March, 1837, entitled 'An act to provide for the enlistment of boys for the naval service, and to extend the term for the enlistment of seamen,' and that his term of service expired on the 20th October, 1839, it was determined that the court was not invested with any legal authority over the person or property of the prisoner, and could exercise no jurisdiction over him whatever." Here the record of the case closes.

Upon this record it is to be observed, in the first place, that the proceedings of the court were irregular in receiving evidence after the court was cleared; for, although the nature of this testimony may not have been of such a character as to cause any substantial injustice by so doing in the present case, yet it is

quite apparent that such a practice is not only contrary to the well-settled law regulating courts-martial, but might lead, in some instances, to great wrong, as well towards the accused as the prosecutor. In the next place, authentic evidence of the terms and period of enlistment on which the accused relied, should have been annexed to, or formed part of, the record; and not a merely inferential statement derived by the court from an inspection of that evidence. The correctness of the inferences which a court-martial may draw from the evidence, and on which it founds its judgment, forms peculiarly a subject for the examination of the officer who is to decide on the propriety of its proceedings; and, therefore, the mere statement of those inferences, unaccompanied by the evidence itself, is a serious defect in the record.

There is also another defect that cannot be overlooked. Not only is the evidence from which the court deduced its inference omitted, but the statement of it which is given in lieu of the evidence itself, is insufficient to justify the conclusion to which they come. Their conclusion is, that the court had no jurisdiction; and they state two facts to support it: first, that the accused enlisted before the passage of the act of 2d March, 1837; and, secondly, that his term of service expired on the 20th October, 1839, which was eight days before he committed the act specified in the charge. Now the act of the 15th May, 1820, authorizes an enlistment "during the continuance of the cruise," provided it does not exceed three years; and as the cruise in this instance was certainly not terminated, it was necessary that the time at which the enlistment commenced should appear in evidence upon the record, in order that the officer revising the proceedings of the court might be satisfied of the correctness of the finding that it had expired by reason of the limitation in the other clause. Yet we are not only without any *evidence* upon that point, but there is not even a statement of the fact by the court.

On these grounds, therefore, I am of opinion that the commanding officer acted properly in declining to approve of the proceedings of the court.

It would not, in my opinion, be proper for the revising authority to make any decision in regard to the effect of the act

Error in Proceedings before Courts-Martial.

of Congress of 2d March, 1837, on this case, when the record is thus defective in presenting, in the usual and legal form, the facts on which the correctness of such a decision must depend.

H. D. GILPIN.

To the SECRETARY OF THE NAVY.

ERROR IN PROCEEDINGS BEFORE COURTS-MARTIAL.

Where a naval court-martial tried a master-at-arms for desertion, on a charge headed with a caption styling the accused "master-at-arms," and discharged him on the ground that since his arrest he had not been borne on the ship's books as such, and that the charge could not at that stage of the trial be revised—HELD, that the decision was erroneous, and that those grounds were insufficient to deter the court from proceeding to judgment on the merits.

ATTORNEY GENERAL'S OFFICE,

June 24, 1840.

SIR: I had the honor to receive your letter of the 18th instant, enclosing the record of the proceedings of a court-martial held on board the United States ship *Fairfield*, at Montevideo, on the 5th November, 1839, in the case of Shubal Palmer, and requesting my opinion in regard to them.

In reply, I have to state that, in my opinion, the decision of the commanding officer, in not approving of the judgment of the court, was correct. It appears that the accused was tried on a charge and specification set forth in the record in the following terms:

"Charge and specification preferred by Thomas Bruce against Shubal Palmer, master at arms on board the United States ship Fairfield.

"CHARGE—desertion.

"Specification.—In this: that the said Shubal Palmer did, on or about the 20th day of January, 1839, desert from the United States ship Fairfield, then at anchor off the harbor of Montevideo, and continued so till apprehended and delivered on board the said ship Fairfield, on or about the 18th September, 1839."

This charge and specification were read to him; and, after they were read, he pleaded "guilty." The court, notwith-

standing this plea, proceeded to hear the evidence produced by the judge advocate; and the accused questioned both the witnesses in his own behalf, offering no objection at any time to the proceedings. In the course of the testimony, Lieutenant Tilton deposed as follows: "The prisoner's rate on the ship's books was master-at-arms previous to his desertion; he is now rated in the same situation in which he shipped in Bahia—I believe an ordinary seaman. We had no man rated as master-at-arms since his desertion." This evidence was given on an inquiry made by the court. None was offered to show that the accused had been formally dismissed from the rank of master-at-arms. When the evidence was concluded, the accused submitted a written defence, in which he still admitted the truth of the fact charged, and relied on no other ground than his general good character and certain mitigating circumstances.

After the case was thus closed, and the record of these facts made up, the court came to the following decision: "The court was then cleared, and proceeded to consider the subject matter before them. But, when about to pronounce judgment, it was discovered that, through hurry or inadvertency, an error had taken place in the title of the prisoner; it appearing from the evidence that he is not, and has not been since his return, master-at-arms on the books of the United States ship *Fairfield*, as named in the charge; and the court being of opinion that the action of this court has proceeded too far to admit of their revision of the charge, do adjudge that the said Shubal Palmer be discharged, and be regarded as standing in the same situation as before the commencement of these illegal proceedings."

In my opinion, this decision of the court was erroneous on three grounds: 1. The error in the addition or designation of the accused was not made in the charge or specification on which he was tried, but merely in the general heading. 2. It is admitted that the accused was master-at-arms when the offence alleged in the charge was committed, and there is no conclusive proof that he had been dismissed from that rank when the charge was preferred. 3. Supposing this, however, to have been clearly established; yet the facts of his having pleaded to the charge, of his never having, in any way, made such an exception or defence, and of there being no dispute whatever as to

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the identity of the person, would have prevented the accused himself from taking advantage of the error at this stage of the case. Of course, it afforded no ground for the court to refuse to proceed to judgment on the merits.

H. D. GILPIN.

To the SECRETARY OF THE NAVY.

COMPENSATION OF VOLUNTEERS IN FLORIDA WAR ACTING AS
TEAMSTERS.

The compensation of teamsters, &c., in the Florida service, was not provided for in the act of 1819, providing pay for fatigue duty in the regular army, but has been provided for specially by Congress, and may be made to the volunteers selected for that service, with the approbation of the commanding general.

ATTORNEY GENERAL'S OFFICE,
June 26, 1840.

SIR: I had the honor to receive your letter of the 18th instant, enclosing certain papers relative to the settlement of the quartermaster's account growing out of the Florida service, and requesting my opinion "whether an allowance of more than the fifteen cents per diem, granted by the act of 2d of March, 1819, and the act of 19th of March, 1836, can be made to non-commissioned officers or privates of volunteer companies regularly mustered into the service of the United States, who are employed as teamsters?"

From the papers enclosed, it appears that during the Florida war, in the year 1838, it became necessary to select and employ, from among the volunteers, those who were thought to be best qualified to perform the duty of teamsters, in lieu of the private persons who had been previously hired, but found to be inefficient. This course was approved by the commanding general, as a measure "needful to the service;" and it certainly tended to protect the public property, facilitate the military movements, and save the United States from heavy losses. The commanding general also approved the terms on which the quartermaster agreed to pay the volunteers so selected. These were thirteen dollars a month, in addition to their pay proper, so as to make the whole allowance barely equal to the

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lowest rate of hired labor: that is, twenty-five dollars a month. This sum was accordingly paid, and the whole amount for which the quartermaster now claims credit is \$384 62. The accounting officers doubt the propriety of allowing the credit, from an impression that the act of 2d of March, 1819, limits the compensation of a soldier employed as a teamster to fifteen cents a day in addition to his pay.

The act of 2d of March, 1819, regulates "the pay of the *army* when employed on fatigue duty;" and provides, that "whenever it shall be found expedient to employ *the army* at work on fortifications, in surveys, in cutting roads, and other constant labor of not less than ten days, the non-commissioned officers, musicians, and privates, so employed, shall be allowed fifteen cents per day while so employed;" and thus, in pursuance of this law, the extra pay to the soldiers in the regular army, for fatigue duty, has been established for more than twenty years, with as much certainty as their monthly pay and other allowances. Accordingly, we now find in the annual appropriation acts for the pay of the regular army, in addition to the appropriation for monthly pay and other allowances, an appropriation expressly made to cover "extra pay to soldiers under the act of 2d of March, 1819." Whether or not the selection of particular soldiers to perform a special trust in time of war, requiring peculiar fitness and evincing more than ordinary confidence in the individual selected, ought to be considered as an employment on "fatigue duty," either under the rules which govern the regular army, or within the terms and meaning of this act, is rather a military than a legal question. At all events, in the view I take of the point submitted to me, it is not necessary to decide it; and I shall, therefore, express no opinion upon it.

Supposing, however, a soldier of the regular army, thus specially selected, to be limited in his pay for that service to an addition of fifteen cents a day; is there any law which places the same limitation on the compensation of soldiers so selected from the volunteer corps of militia that were raised for, and engaged in, the Florida war? There is certainly no law which prescribes the amount of such extra pay, in terms, as the act of 2d of March, 1819, does in regard to the regular troops. When we turn to the act of 19th of March, 1836, which regu-

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lates the pay of volunteers and militia, and is expressly applicable to those employed in Florida, we find this provision: "that the officers, non-commissioned officers, musicians, artificers, and privates of volunteers and militia corps, who have been in the service of the United States at any time since the 1st of November, 1835, or may hereafter be in the service of the United States, shall be entitled to receive the same *monthly pay*, rations, clothing, or money in lieu thereof, and forage, as may be provided by law for the officers, musicians, and privates of the infantry of the army of the United States." It will thus be seen that no provision is made by which volunteers or militia are to receive, or can be entitled to, extra pay for fatigue duty, which is provided by law for soldiers in the regular army. Again: when we turn to the special appropriation acts of the 12th of June, 1838, and 3d of March, 1839, which provide for the payment of these volunteers and militia, and refer in terms to the act of 19th of March, 1836, as regulating their pay and allowances, we find no appropriation to cover any extra pay for fatigue duty, as in the appropriations for the regular army. On the contrary, we find a special clause in each of these acts, but which is not found in the army appropriation acts, providing a distinct fund "for the hire of a corps of mechanics, laborers, mule drivers, teamsters, wagon-masters, and other assistants."

This comparison of the acts regulating the pay and making appropriations for the regular army, and for the volunteers and militia who have been in the service of the United States since 1835, clearly shows, in my opinion, that it was not the intention of Congress to make the provisions of the act of 2d of March, 1819, applicable to the latter, even if you should be of opinion that they are applicable to soldiers specially selected, in time of war, from the regular army, to act as teamsters.

H. D. GILPIN.

To the SECRETARY OF WAR.

DEFICIENCY OF LANDS GRANTED TO OHIO FOR ERIE AND WABASH CANAL.

The deficiency of lands granted Ohio in act of 29th May, 1830, to make up the full quantity previously granted for the construction of a canal from Lake Erie to the Wabash, must be supplied from the alternate sections reserved to the United States, or out of other lands in the neighborhood near to the canal.

Deficiency of Lands granted Ohio for Erie and Wabash Canal.

Those parts of sections which are cut by the parallel line, five miles distant from the canal, may be located; and quantities equal to the computed area of the cut sections may be located according to any of the usually recognised minor subdivisions of a section among the alternate sections accruing to the State along the exterior limits of the belt.

If obstacles shall be found to exist to the location of sufficient land on the exterior limits of the belt in minor divisions, the complement may be made up from full alternate sections.

But no sections nor subdivisions are to be excluded because they happen to be cut by and protrude beyond the exterior line of the belt.

ATTORNEY GENERAL'S OFFICE,
June 26, 1840.

SIR: I had the honor to receive your letter of the 25th of May, enclosing certain papers from the Commissioner of the General Land Office, relative to the claim of the State of Ohio to certain lands for the purpose of constructing the canal between the river Wabash and Lake Erie; and requesting my opinion on the construction of the first section of the act of the 2d of March, 1827, the fourth section of the act of 24th May, 1828, and the first section of the act of 30th June, 1834.

The first of these acts granted to the State of Indiana, for the purpose of aiding in opening the canal, "a quantity of land equal to one half of five sections in width, on each side of the canal;" and reserved each alternate section to the United States, to be selected by the Commissioner of the General Land Office, under the direction of the President, from one end thereof to the other. The second act authorized the State of Indiana to convey and relinquish to the State of Ohio, upon such terms as those States might agree upon, all the right and interest granted to the former by the first act, upon the same conditions of aiding in the construction of the canal. The third act provided that, in lieu of any of the lands included in these grants, which might have been sold or otherwise disposed of by the United States, an equal quantity might be selected from the alternate sections, which would otherwise belong to the United States, or from lands recently acquired by purchase from the Indians, or from other lands in the neighborhood, near the line of said canal.

It appears by the papers transmitted to me, that the General Assembly of Indiana, on the 1st of February, 1834, conveyed

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and relinquished to the State of Ohio all the right and interest of the State of Indiana to any land within the limits of Ohio, to which Indiana was entitled under the act of the 2d March, 1827.

On the 7th October, 1836, the Commissioner of the General Land Office proceeded, at the instance of the governor of Ohio, to carry these laws into effect. With this object, he caused two lines to be drawn on the official map—one on each side of the canal, where it was laid out in the State of Ohio, at a distance of five sections (or miles) therefrom, and parallel thereto. Within these limits he subsequently proceeded to set off, alternately to the State of Ohio and to the United States, all the full sections of land contained therein. He also apprized the governor of Ohio that he considered the State to be entitled to one-half of all the lands included within these limits;—that is, as I understand it, to a quantity of land equal to one-half of the entire quantity embraced therein.

The whole number of acres within these parallel lines is not stated; and, of course, the portion coming to the State of Ohio cannot yet be exactly ascertained. As, however, the quantity contained in the full sections which were thus located and appropriated to the State amounts to far less than that portion, the residue remains to be located and appropriated, in order to complete the quantity of land granted by Congress. In proceeding to do this, doubts have arisen on several points, which are finally resolved into those submitted to me in the following questions:

“First: Can those *parts of sections* which are cut by the parallel line, five miles distant from the canal, be located under the existing laws?”

“Second: If the foregoing question be answered affirmatively, can a quantity of land, equal to the computed area of the cut sections, be located according to any of the usually recognised *minor subdivisions* of a section, among the alternate sections accruing to the State along the *exterior limits of the belt*, and as near as may be within those limits, although, as in the case of the Indian grants, (where the locations were confined to entire sections,) corners of those minor subdivisions would protrude somewhat beyond those limits?”

“Third: As portions of the sections on the exterior limits of the belt have been sold, an obstacle will exist to obtaining, in many instances, the full quantity out of the actually accruing sections, although the foregoing interrogatories should receive an affirmative answer; it will therefore remain to be further inquired, whether, in cases where such obstacles do exist, the State may be permitted to obtain the proper quantity by locations to be made out of the alternate sections remaining to the United States, as was authorized by the act of June 30, 1834, in cases where *full sections* were interfered with by previous sales?”

These questions, if I correctly understand them, must, in my opinion, be all answered in the affirmative. I think the decision of the Commissioner of the General Land Office, as to the quantity of land granted to the State, is correct; that it was not a grant of a certain number of sections, but that it was a grant of half the whole number of acres of land that would be contained within certain limits. If this were not made obvious by the express language of the act of March 2, 1827, all doubt would be removed by reference to the construction put upon it by Congress in the act of May 29, 1830, where they appropriate a specific number of acres to supply the deficiency in so much of the grant as belonged to the State of Indiana.

The manner of locating the lands thus granted appears to me to be designated with as much precision as the quantity. The three acts of Congress, which were all passed before any proceedings on the subject were commenced, are to be taken together. They clearly show that it was the intention of Congress, in the first place, to exclude from the operation of the grant all lands that had been previously sold or disposed of; in the next place, to reserve to the United States, out of the body of land granted, every alternate section, so as to compensate any loss the revenue might sustain from the gift to the State, by the increased value which the canal would give to the portion retained; and, lastly, to make up to the State the whole quantity of the land to which she was entitled, by appropriating to her all the remaining sections to the width of five on each side of the canal. If that was not sufficient, then the residue of the quantity was to be made up out of the alternate sections

Scrip to the Heirs of Captain Kirkwood.

reserved to the United States, or out of the lands recently purchased from the Indians, or out of the other lands in the neighborhood and near the canal: the latter, of course, not being limited to the body of land within the exterior lines of the grant, because the whole of that was already distinctly set apart for the same purpose.

There is nothing, it is true, in either of the acts, which designates the form of the locations, further than the appropriation of a certain "quantity of land equal to one-half of five *sections* in width on each side of the canal;" but I think there can be no doubt that it was the intention of Congress to make the grant in accordance with the long-established system of the public surveys, and that the general manner of location above adverted to was to be carried into effect without interfering with that system. Should, therefore, the lands in such of the five sections extending from the canal on each side as have not been disposed of or set off to the United States be still deficient in making up the quantity coming to the State, the residue is to be made up from the other lands above indicated, either in the sections, or the minor subdivisions recognised by the land system, as may be necessary; nor are such sections or subdivisions to be excluded, because they happen to be cut by, and protrude beyond, the exterior line of the belt.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

SCRIP TO THE HEIRS OF CAPTAIN KIRKWOOD.

The heirs of Captain Kirkwood, who entered the revolutionary service in the Delaware regiment, in the year 1776, and continued in service until the end of the war, are entitled to scrip on a warrant issued for three hundred acres of land on account of his services, whether they were properly entitled to scrip on a warrant for four thousand acres issued by the executive of Virginia or not.

It appears that, by a construction given to certain acts and resolutions of Congress, and of Virginia, such of the troops from other States as were, in the course of the war, attached to the Virginia State establishment, and continued in service to the end thereof, were entitled to the same bounty from Virginia as if they were originally raised in that State.

Scrip to the Heirs of Captain Kirkwood.

In case the Secretary of the Treasury shall have any good reason to believe that such warrants have been issued in error or mistake, he may suspend the issue of scrip; or, if issued, cause measures to be taken to have it cancelled.

ATTORNEY GENERAL'S OFFICE,
July 1, 1840.

SIR: I had the honor to receive your letter of the 18th May, transmitting to me certain documents connected with the case of Robert Kirkwood, a captain in the revolutionary army, and requesting my opinion relative to the issue of scrip on a Virginia land warrant to his representatives, pursuant to the act of 30th May, 1830.

The facts of the case appear from the documents to be these: Robert Kirkwood entered the revolutionary army as a captain in the Delaware regiment, in the year 1776, and continued in service, without intermission, to the end of the war. By the resolution of Congress of the 16th September, 1776, a captain who continued in the service till the end of the war was entitled to three hundred acres of land, to be provided by the United States. By acts of the General Assembly of Virginia, passed in October, 1779, and October, 1780, officers of the Virginia continental and State lines, who should serve to the end of the war, were to be entitled to certain bounties in land from the State of Virginia: the quantity provided for a captain was four thousand acres. By the resolution of Congress of 3d October, 1780, it was provided that "the regiments of cavalry, artillery, and artificers, as they now stand, be considered as belonging to the States respectively to which they are or may be assigned; which States shall complete them to the full complement, supply them with necessaries, and in every respect treat them as if originally raised therein." In March, 1780, the Delaware and Maryland regiments were sent to reinforce the southern army; their devoted bravery at the battle of Camden is well known; and, after that affair, the Delaware regiment was reduced to two companies of infantry, only numbering one hundred and seventy-five men altogether—the one commanded by Kirkwood, the other by Captain Jaquett. It appears by the depositions of Captain Jaquett and Lieutenant Bennett, also an officer of the same regiment, that "soon after General Greene took the command of the southern army, and, by his general

Scrip to the Heirs of Captain Kirkwood.

order issued, the two Delaware companies were attached to Colonel William Washington's (Virginia) regiment of cavalry, and acted together as a legionary corps until peace was declared and the army disbanded in the year 1783." The bravery and services of Kirkwood and his little band, especially at the battles of Guilford and Eutaw, are well-known historical incidents; and in the published accounts of those affairs, as also that of Ninety Six, he is mentioned as being under command of Colonel Washington. He is stated to have been discharged in August, 1783, at the close of the war. In the year 1785 he was settled with, in pursuance of the resolution of Congress, as a captain in the Delaware continental line; and on the 25th of May, 1791, received his warrant for three hundred acres of bounty land from the United States. This never appears to have been claimed; and on the 25th of January, 1825, on an application made by his son, Joseph Kirkwood, and his other heirs, a new warrant ~~was~~ issued to them for three hundred acres, in accordance with the provisions of the act of 15th April, 1806. This warrant, however, was not located.

It appears by the statements in the bounty land office, that as early as 1819 Colonel Rudolph, of the Maryland line, and Major McLane, of the Delaware line, who had been attached to Lee's (Virginia) legion; and as early as in 1822, Lieutenants Ricketts, Wilmot, Williamson, and probably others of the Maryland line, who had been attached to Harrison's (Virginia) artillery regiment, had been recognised by the authorities of the State as also entitled to bounty-land from Virginia; which they accordingly received. In 1832 similar allowances were made to Lieutenant Bennett and Captain Jaquett, and the representatives of Captain Kirkwood, on the ground, as appears by the documents, of their having been attached to Washington's (Virginia) cavalry regiment. Warrants were accordingly issued to them by the executive of Virginia, in accordance with the provisions of the act of 30th May, 1830. That to the representatives of Kirkwood is dated 20th February, 1833, for four thousand acres, for his services as a captain for three years in the continental line of that State; and these heirs, under the same act, received from the Treasury Department, on the 12th April, 1834, scrip therefor. In March last the same heirs made

Scrip to the Heirs of Captain Kirkwood.

application to the General Land Office, under the provisions of the 16th section of the same act, for scrip for the three hundred acres mentioned in the warrant of 25th January, 1825.

On this application being made, the fact of the previous issue of scrip to the same persons was adverted to; and it being doubted whether Captain Kirkwood could be regarded as ever having been on the Virginia State establishment, the facts were brought to the notice of the proper authorities of the State. This has been succeeded by a correspondence which is among the documents. The issue of the warrant by the executive of Virginia is justified by the register of that State, on the ground of Captain Kirkwood having been attached to a Virginia cavalry regiment in 1780, and served therewith to the end of the war; and also by the recognition of such proceeding by the resolution of Congress of 3d October, 1780, above referred to; and a copy of the documentary proof sustaining the facts, and submitted to the executive of Virginia before the warrant issued, is transmitted by that officer. These circumstances are regarded as bringing the case within the original provisions of 1779 and 1780, and entitling the applicant to the land bounty therein provided. The cases of the other officers already adverted to seem to show that such a construction has prevailed, and been acted upon by the authorities of Virginia, for more than twenty years.

If this state of facts be correct, I have no hesitation, in reply to your inquiry on this point, to express my opinion that there is no ground for withholding the scrip due from the United States to the heirs of Captain Robert Kirkwood, in lieu of their warrant of 25th January, 1825. To that they have clearly a right, under the provisions of the 6th section of the act of 30th May, 1830. No fraud, error, or impropriety on their part is alleged. The quantity claimed from the United States is that to which they are entitled. The quantity allowed in 1834, under the Virginia land warrant, was that which the acts of Assembly of that State authorized; the warrant was issued on evidence, of which the correctness is not disputed, and after full consideration of the authorities of Virginia; if there be any error, it arose not from the conduct of the claimants, but from an incorrect construction of the acts of Assembly by the exec-

Scrip to the Heirs of Captain Kirkwood.

utive of Virginia. The scrip was granted by the United States six years ago, upon this warrant, although the evidence was in the possession of their officers here, showing that the heirs of Captain Kirkwood had received, and then held, the warrant from the Secretary of War for the three hundred acres coming to him from the United States, as a captain in the Delaware line. Supposing the construction of the executive of Virginia, on which the Treasury Department issued the scrip in 1834, to be incorrect, it does not, in my opinion, authorize a refusal to issue that now claimed.

I proceed to reply to your other inquiry—whether the Treasury Department can go behind a Virginia land warrant, to ascertain whether an officer was on her own State establishment. By the 1st section of the act of 30th May, 1830, Congress declares that “the officers and soldiers, sailors, and marines, who were in the service of Virginia, on her own State establishment, during the revolutionary war, and who were entitled to military land bounties by the laws and resolutions of that State, their heirs and assigns, shall be authorized to surrender to the Secretary of the Treasury of the United States such of their warrants for the said land bounties as shall remain unsatisfied, in whole or in part, and to receive certificates or scrip for the same.” By the 5th section of the same act, Congress further declares that its provisions shall extend, generally, “to every person to whom the State had engaged to pay land bounty for services in the revolutionary war, of any description, by any law or resolution passed and in force at the date of the deed of cession by the State of Virginia to the United States.” By the 2d section of the same act, Congress thus described particularly the warrants in lieu of which they authorize the Secretary of the Treasury to issue scrip: “No warrant shall be taken to be within the provisions of the act, which shall hereafter be granted, unless the executive of Virginia shall cause a certificate to be endorsed thereon, signed by some officer, stating that the party to whom such warrant shall be granted, his, her, or their ancestor or devisor, was entitled thereto by some law or resolution of the said State, in force at the time of the deed of cession.” I am of opinion that it was the intention of Congress, by these provisions, to give scrip to every person entitled, be-

Contractors for Removal of Chickasaws—How to be Paid.

fore the deed of cession, to land bounty from Virginia, for revolutionary services which had not been satisfied, provided he applied therefor within the proper time; and that it was also their intention to leave to the executive of Virginia the authority to ascertain and certify, by its warrants, the persons who were entitled to such bounty. If, however, before the Treasury Department shall act upon the warrants, it has well founded reason to apprehend that they were issued in palpable error or mistake, I have no doubt that it is competent for it to suspend the issue of the scrip, and to submit the facts of the case to the proper authorities of Virginia, so that it may be re-examined, and the warrants cancelled if illegally issued. Even where the scrip has been improvidently issued, and the supposed error has been subsequently discovered, the same course may be pursued; and if the error in issuing the warrant is confirmed, appropriate legal steps may and should be instituted by the United States to recover back the amount.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

CONTRACTORS FOR REMOVAL OF CHICKASAWS—HOW TO BE PAID.

Contractors for the removal of the Chickasaws to their new homes must be paid from the appropriation of the Chickasaw fund made by the act of the 20th of April, 1836, even though some of the Indians did not avail themselves of the means furnished to remove them.

ATTORNEY GENERAL'S OFFICE,

July 2, 1840.

SIR: I have examined, in compliance with your verbal request this morning, the act of Congress of the 20th of April, 1836, which makes an appropriation for carrying into effect the treaties of the 20th of October, 1832, and 24th of May, 1834, with the Chickasaw Indians; and I now proceed to reply to your inquiry, whether the accounting officers have acted correctly in charging to that appropriation the sum which they have found to be still due to Simeon Buckner, the person with whom a contract was made by the United States for the transportation of those Indians to their new homes.

Contractors for Removal of Chickasaws—How to be Paid.

The act referred to makes an appropriation, out of the moneys received from the sale of their ceded lands, for all payments and expenses which the United States are bound to make and provide for under those treaties. By the tenth article of the first treaty, the President is required "to furnish the Chickasaws with the necessary funds and means for their transportation and journey" to their new homes; and they agree, on their part, that "the full amount of such funds and transportation is to be paid out of the proceeds of the sales of their ceded lands." By the thirteenth article of the second treaty it is provided that, when the whole or any portion of the nation intend to remove, "the United States will furnish competent persons safely to conduct them to their future destination, and also supplies for the same;" and it also provides that "the supplies so afforded are to be chargeable to the general Chickasaw account," provided the funds of the nation shall be found adequate to the expenses which, under that and the other articles of the treaty, are required.

It appears, as the facts are represented to me, that, in accordance with these stipulations made by the United States, a contract was entered into with Simeon Buckner to transport a certain number of these Indians to their new homes, they having made a request to that effect; that, under this contract, means of transportation and the necessary supplies were furnished for the specified number, though a part of those so designated, and at whose request the preparations were made, did not avail themselves of them; and that the proper accounting officers have, after full examination, decided that the sum yet unpaid is legally due to Mr. Buckner, under and by virtue of the above contract.

Upon this state of facts, I have no hesitation in expressing my opinion that the sum so found and reported to be due is correctly charged to the appropriation made by the act of 20th of April, 1836.

H. D. GILPIN.

To the SECRETARY OF WAR.

Pre-emptions in respect to Fractional Sections.

EXPENSES OF COLLECTORS IN PERFORMING EXTRA SERVICES.

Where collectors, naval officers, and surveyors, are required by the Secretary of the Treasury to perform services which are unconnected with their official duties, the necessary expenses actually incurred in the performance of those extra duties may be allowed them.

ATTORNEY GENERAL'S OFFICE,
July 7, 1840.

SIR: I had the honor to receive your letter of the 27th of June, in which you inquire whether, under the provisions of the eighteenth section of the act of the 7th of May, 1822, and the third section of the act of March 3, 1839, the collector of Boston can be allowed the actual *expenses* incurred in performing certain services, unconnected with his official duties, which have been required of him as a commissioner to superintend the erection of the new custom-house at Boston.

It has been, as I am informed, the established usage of the accounting officers, since the passage of the act of 7th of May, 1822, to allow the *necessary expenses* actually incurred in the performance of those extra duties which the head of the Treasury Department does and is authorized to assign to collectors, naval officers, and surveyors, though no *compensation*, or *allowance for any personal services*, beyond the limitation prescribed by the act, has been considered as being sanctioned thereby. I am of opinion that this construction of the act of 7th of May, 1822, is correct. I am also of opinion that the third section of the act of 3d of March, 1839, does not preclude the allowance of the necessary expenses that may be actually incurred in such a case.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

PRE-EMPTIONS IN RESPECT TO FRACTIONAL SECTIONS.

The dwelling-house of a pre-emptor being on a fractional section and his improvements extending over upon another fractional section and upon an entire one, his right of pre-emption cannot be admitted to the three, but is limited to his domicile and one of the other two sections of land.

Pre-emptions in respect to Fractional Sections.

The permissive possession of twenty-seven years may give him strong equities, which may be addressed to the legislature; yet the land officers can only be governed by existing acts of Congress.

OFFICE OF THE ATTORNEY GENERAL,

July 8, 1840.

SIR: I had the honor to receive your letter of the 3d of June, 1840, enclosing certain papers from the Commissioner of the General Land Office, relative to the pre-emption claim of George C. Sibley, and requesting my opinion of the legal point arising therein.

The facts of the case, as presented by the papers, appear to be these. George C. Sibley had, under the acts of the 5th of February, 1813, and 29th of April, 1816, a pre-emption right to certain land in the Territory of Missouri. The proofs of settlement and improvement were in all respects satisfactory to the register and receiver, and are so regarded by the Commissioner of the General Land Office. The only doubt is as to the quantity of land which he is authorized to enter. This doubt arises from these circumstances. The house of the claimant was on fractional section number thirty-five, (which contained less than one hundred and sixty acres,) and immediately westward extended his improvement of ten or twelve acres in one body. The position of this improvement was such, that it commenced near the house on fractional section number thirty-five, and extended into the northeast fractional quarter of section number thirty-four, and also into the southeast quarter of section number thirty-four; both of which quarter sections were contiguous to fractional section number thirty-five. The house was thus on the fractional section, and the improvement extended from it, and was on all the three tracts. The question is—whether, under the act of April 29, 1816, the claimant can enter two or three of these tracts?

The first section of the act of 29th of April, 1816, declares, that any person having a pre-emption right under the act of 5th of February, 1813, or that of April 12, 1814, “who is settled on a fraction of a section, or fractional quarter section containing less than one hundred and sixty acres, shall have the privilege of purchasing one or more adjoining fractional sections, or the adjoining quarter section, including their improvements, or

Pre-emptions in respect to Fractional Sections.

the fraction improved by them, at their option." The second section of the same act refers exclusively to cases where two or more persons having a pre-emption right are settled on the same quarter section, and has no bearing on the present inquiry.

I am of opinion that the claimant in this case, being settled on a fraction of a section containing less than one hundred and sixty acres, is entitled to enter, in addition to the fractional section on which he is settled, either the adjoining fractional quarter section, or the adjoining quarter section, but not both. The words of the act are explicit. Where the adjoining quarter sections are *fractional*, the settler is authorized by this act to enter more than one; but where the adjoining quarter sections are entire, he is authorized to enter only one. In this case, it appears that, in point of fact, of the two adjoining quarter sections, one is fractional and one is entire. Had they both been fractional, the act would authorize the settler to enter both; as it is, that right is limited to one or the other. Nor is this construction (which, in my opinion, is the only one the language of the act will permit) inconsistent with the fact referred to by the register at St. Louis—that, under its provisions, a quantity of land equal to four hundred and sixty-eight acres has been in some instances allowed to a single pre-emptor; for it is evident that such may readily be the case where there are two *fractional* quarter sections adjoining the tract on which the claimant is settled.

I am not insensible to the equitable claim which the settler may urge from a permissive possession of twenty-seven years; but this is a claim which must be addressed to the legislature. The Land Office can only be governed in the allowance of such rights by the directions of the existing acts of Congress; and I cannot bring myself to consider those which must regulate the present case as at all ambiguous.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Company Officers only provided for in Act of March 19, 1836.

REMOVAL OF CERTAIN SETTLERS ON PUBLIC RESERVATIONS.

The President may authorize the marshal to remove all persons who have fixed their residences on the public reservations, without authority, beyond the lines of the posts of Tampa Bay, for the purpose of selling liquor to the troops, and the suspected purpose of supplying the Indians with ammunition.

ATTORNEY GENERAL'S OFFICE,

July 9, 1840.

SIR: I have looked over the letter you left with me from General Armistead, dated 22d June, relative to the persons who have fixed their residences, without authority, on the public reservations, but beyond the lines of the posts of Tampa Bay and other places, for the purpose of selling liquor to the troops, and, as is believed, supplying the Indians with ammunition. I am of opinion that the marshal of the Territory, or his deputy, has authority, under such instructions as may for that purpose be given by the President of the United States, to remove all such persons from the reservations.

H. D. GILPIN.

To the SECRETARY OF WAR.

COMPANY OFFICERS ONLY PROVIDED FOR IN ACT OF MARCH 19, 1836.

Company officers only are entitled to the forty cents a day provided by the 2d section of the act of 19th March, 1836.

ATTORNEY GENERAL'S OFFICE,

July 11, 1840.

SIR: I have had the honor to receive your letter of the 10th June, enclosing a communication from the Second Comptroller, relative to the second section of the act of 19th March, 1836, and inquiring whether the *regimental* officers of mounted volunteers are entitled to the forty cents a day provided by that section for officers of mounted *companies*.

In reply, I have to state that, in my opinion, such was not the meaning of the act. The intention of Congress to confine this allowance to company officers is, I think, made apparent, not only by the express designation of "officers of mounted

Payment of the Three Per Cent. Fund to Ohio.

companies," as those to whom it is given, but by the fact that it is coupled with the clause which allows the officer who is to receive it the use of two horses only, which is the number assigned to a captain.

H. D. GILPIN.

To the SECRETARY OF WAR.

PAYMENT OF THE THREE PER CENT. FUND TO OHIO.

If satisfied of the correctness of the account furnished by the commissioners of the school fund in Ohio, the Secretary of the Treasury may allow the three per cent. to accrue to Ohio thereon—no further proof being required by the act of 1820.

ATTORNEY GENERAL'S OFFICE,

July 15, 1840.

SIR: I had the honor to receive your letter of the 11th instant, enclosing a communication from the governor of Illinois, and certain documents relative to the payment of the three per cent. fund to that State; and inquiring whether the amount due to the State could be allowed on the account furnished by the commissioners of the school fund, or whether evidence was to be required as to the application of the fund by the State.

By the sixth section of the act of Congress of 18th April, 1818, it is required that three-fifths of the five per cent. fund, derived from the sales by the United States of public lands in Illinois, shall be paid to the State, and appropriated by its legislature for the encouragement of learning. By the act of the 12th December, 1820, the Secretary of the Treasury was directed to pay over the sums thus coming to the State to such person as the legislature should authorize to receive them, to be applied to the above purposes; and an annual account of the application of the money was to be transmitted to him by such officer of the State as the legislature should appoint. In default of such return, the Secretary of the Treasury was to withhold the payment of all accruing sums until it should be rendered.

The legislature of Illinois, by an act passed on the 15th January, 1825, established a system of free schools through the State, and, among other provisions, constituted the auditor and Secretary of State, under the directions of the governor, com-

Payment of the Three Per Cent. Fund to Ohio.

missioners of the school fund. They vested in the commissioners the fund which was then on deposit in the State bank, together with all such moneys as should accrue to the State for the use of schools and a seminary of learning by virtue of any act of Congress, to be applied in such manner, for that object, as should be prescribed by law; and they authorized the commissioners, or a majority of them, to receive and give acquittances for all the moneys which the State was entitled to receive from the United States. By subsequent laws, the commissioners were required to deposit the moneys so received in the State treasury; and it was declared that the State should be, and was, chargeable with interest thereon at the rate of six per cent. per annum; and provision was made for the distribution of this interest annually, in certain proportions, among the several counties of the State, according to the regulations of the school system.

By the documents enclosed in your letter, it appears that the amount of the three per cent. fund, prior to the year 1832, has been accounted for to the Treasury Department. The present purports to embrace all the money received from the United States, under the acts of Congress above referred to, from that time to the 30th March, 1839. It also purports to exhibit the payment to the State of Illinois, under the acts of its legislature above referred to, of the entire amount so received. The account is signed by the auditor and Secretary of State, as the commissioners of the school fund; and the governor states that it is prepared and transmitted under his direction, in compliance with the acts of Congress, and for the purpose of receiving the moneys due to the State from the United States.

I am of opinion that, if satisfied of the correctness of this account, the Secretary of the Treasury is authorized to allow the payments subsequently accruing to the State; and that no further proof of the application of the fund by the State is required by the act of Congress of 12th December, 1820.

H. D. GILPIN.

TO THE SECRETARY OF THE TREASURY.

The Right of Bartholomew Pellerin to a Patent for Land.

COMMISSIONS OF RECEIVERS GENERAL.

The commissions of the receivers general, appointed under the act of the 4th of July, 1840, should be made out, sealed, and recorded at the State Department.

ATTORNEY GENERAL'S OFFICE,

July 15, 1840.

SIR: I had the honor to receive your letter of the 14th instant, inquiring whether the commissions of the receivers general, appointed under the act of the 4th July, 1840, should be issued by, and recorded in, the State or Treasury Department.

In reply, I have to say that, in my opinion, the Secretary of State is the proper officer to make out, and record, and affix the seal of the United States to these commissions, pursuant to the provisions of the fourth section of the act of 15th September, 1789.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

THE RIGHT OF BARTHOLOMEW PELLERIN TO A PATENT FOR LAND.

The claim of Bartholomew Pellerin to a patent for seventeen thousand and eighty-four arpens of land in Mississippi, on pretence that his title is founded on a legal British grant made previous to 1783, and recognised and confirmed by the Spanish government in 1810, cannot be recognised at the General Land Office. His claim having been reported and confirmed as one founded on a private conveyance for twelve hundred and eighty acres only, as a donation, a patent for that quantity only can issue, unless further legislation shall authorize it.

ATTORNEY GENERAL'S OFFICE,

July 16, 1840.

SIR: I had the honor to receive your letter of the 1st instant, enclosing a communication and numerous documents from the Commissioner of the General Land Office, relative to the claim of Bartholomew Pellerin, for a patent for certain land in Mississippi, under the act of 3d of March, 1819, and inquiring whether that claim ought to be confirmed by the General Land Office, and the patent issued.

The act of Congress of the 25th of April, 1812, provided that, for the purpose of ascertaining the titles and claims to

The Right of Bartholomew Pellerin to a Patent for Land.

lands in the tract of country which lies south of the Mississippi Territory, east of the river Mississippi and island of New Orleans, and west of the river Perdido, and a line drawn with the general course thereof to the southern boundary of the Mississippi Territory, the lands within the said limits should be laid off into two land districts, between which Pearl river was to be the boundary. It also provided that for each of these districts a commissioner of land claims should be appointed, whose duty it was made to attend and receive notice and evidence of titles and claims to lands within his district. By the fourth section of the same act, every person claiming lands in that tract of country, by virtue of any French, British, or Spanish grant, order of survey, or other evidence of claim, was to present a notice and statement of his claim, with the evidences, which were to be entered of record; and the commissioners were required by the act to examine into the justice and validity of the claims, and to ascertain, in every instance, "whether the lands claimed had been inhabited and cultivated; at what time such inhabitation and cultivation commenced; when they were surveyed, and by whom and what authority; and into every other matter respecting the claims which might affect the justice and validity thereof." The commissioners were further required to prepare abstracts from the records of claims, arranging them in classes according to their respective merits, and embracing the substance of the evidence, and such information as might be necessary for a correct decision. They were also required to report a list of all the actual settlers on lands in their districts who had no claims derived either from the French, British, or Spanish governments.

In compliance with this law, William Crawford, the commissioner for the district east of Pearl river, transmitted a report, which was laid before Congress on the 2d January, 1816, containing eleven lists or abstracts of claims, and also a list of actual settlers. Among these abstracts were lists of claims founded, or alleged to be founded, on grants derived from the French, British, or Spanish governments, with the opinion of the commissioner, in nearly all of them, in favor of or against their validity. There was also an abstract or list which is marked No. 10, and is thus described by the commissioner:

The Right of Bartholomew Pellerin to a Patent for Land.

“A register of claims founded on *private conveyances*, which have passed through *the office of the commandant*; but founded, *as the claimants suppose*, on grants lost by time or accident.” At the end of this register, the commissioner subjoins the following remarks: “Though the original grants, upon which the preceding claims were founded, have been lost, yet it is conceived that the claims to such lands, not exceeding a *reasonable quantity*, as were *inhabited and cultivated under the Spanish government*, ought to be confirmed.” On this list is found entered (No. 62) the claim of Bartholomew Pellerin, the original settler being the widow Masmer, (Asmard,) for seventeen thousand and eighty-four arpens, situated on the bay of St. Louis, and stated to have been inhabited and cultivated from 1775 to 1814. The report contains no further remarks whatever upon this claim.

On the 3d of March, 1819, Congress passed a law in regard to the claims which it was thus intended to provide for by the act of 25th of April, 1812. The first section of that act recognises as valid and complete titles against the United States—First, all claims to lands founded on complete *grants from the Spanish government*, which are contained in the reports of the commissioner, and which are, in the opinion of the commissioner, valid agreeably to the laws, usages, and customs of that government:—Secondly, all claims founded on *British grants* contained in the reports, which had been sold or conveyed, according to the treaty of 3d of September, 1783, between Great Britain and Spain, or which were settled and cultivated by the person having the legal title therein at the date of said treaty. The second section of the same act (after making provision for certain claims founded on incomplete titles) goes on to provide, generally, that “for all the other claims to land comprised in the reports aforesaid, and which ought, in the opinion of the commissioner, to be confirmed, the claimant to such land shall be entitled to a grant therefor as a donation.” But such grant, as a donation, is not to be made to any one person for more than twelve hundred and eighty acres; and the confirmation of the incomplete titles and the grants of donations, are to amount only to a relinquishment forever, on the part of the United States, of any claim what-

The Right of Bartholomew Pellerin to a Patent for Land.

ever to the tract of land so confirmed or granted; and no such claim is to be confirmed to any person to whom a title to any tract of land shall have been recognised under the preceding provisions. The twelfth section of the same act goes on to provide that the register and receiver in the proper district may examine the claims recognised or confirmed by the act, and grant a certificate, according to the nature of the case, under instructions from the General Land Office; that office is then authorized, on presentation of such certificate for a confirmed claim or for a donation, according to the provisions of the act, to grant a patent in the usual manner, if it shall be satisfied that the certificate was fairly obtained according to the true intent and meaning of the act.

It appears that on the 24th of November, 1838, the register and receiver of the land office at Augusta, Mississippi, granted a patent certificate (No. 24) to Bartholomew Pellerin, for twelve hundred and eighty acres, under an opinion that the claim, being comprised, in the manner above stated, in the report of Commissioner Crawford, was confirmed to the extent of twelve hundred and eighty acres, as a donation, by the second section of the act of 3d of March, 1819. This certificate has been returned to the General Land Office, with a plat of survey for the quantity designated in the certificate, but no patent has yet been issued thereon.

The present application is, that the Commissioner of the General Land Office shall direct a survey to be made of the entire claim for seventeen thousand and eighty-four arpens, and, when the survey is completed, award a patent therefor. It is accompanied with an elaborate argument, and a mass of documentary evidence to sustain the ground taken, that the claim is founded on a legal British grant made previous to the year 1783, and recognised and confirmed by the Spanish government in the year 1810.

I am of opinion that the General Land Office has no authority to award the patent asked for in this case. The authority so to do, if it exists, is derived under the first section of the act of 3d of March, 1819; and I do not think that it was the intention of Congress to embrace such a case within the provisions of that section. It is not contended that the claim falls

The Right of Bartholomew Pellerin to a Patent for Land.

under the first class of cases therein mentioned—those derived under the *Spanish grants* reported by the commissioner to be valid. If, then, it is included at all, it must be a claim founded on a *British grant*, contained in the report of Commissioner Crawford, which had been sold or conveyed according to the treaty of 1783, or which was settled and cultivated by the person having the legal title thereto in 1783. There are many claims answering this description in the reports of the commissioner. Is this one of them? Is this claim so reported to Congress in the abstract upon which that body legislated? Is there any evidence whatever that it was regarded by the commissioner, or intended to be reported by him, as a claim founded on a British grant, where the person having the legal title was settled in 1783? We must certainly answer in the negative. For not only is there no such description of it in terms in his report, but it is there stated to be a claim founded on a private conveyance, though derived, as the claimants suppose, under a grant lost by time or accident, and, as such, it is recommended to be confirmed for a reasonable quantity, and as being inhabited and cultivated under the Spanish government. There is nothing to indicate the intention of Commissioner Crawford to report this case as a legal British grant, or one that had been “settled and cultivated by the person having the legal title therein in 1783;” on the contrary, his intention appears to be to recommend the confirmation of the claim for such a quantity of land as Congress may deem reasonable, on the ground of habitation and cultivation under the Spanish government.

It will hardly be urged that it was the design of Congress, when legislating upon these reports, to confirm grants which should be established by evidence before the General Land Office to be of a different character from that in which they are presented by the reports. It has been a settled decision of the General Land Office, when acting by the special authority of Congress upon claims embraced (as this is) in the report of a commissioner, that they must appear, from the face of the reports themselves, to fall within the rules prescribed for their confirmation; and that Congress have not, in such cases, invested the General Land Office with power to act upon facts

Bonds of Deputy Postmasters under Act of July 4, 1840.

that are not evidenced by the reports. I cannot doubt that this decision is correct, and that where the facts shall present the claim in a manner different from that in which it is set forth in the report, further legislation is necessary to authorize the General Land Office to award a patent.

Considering this view of the case as sufficient to oblige the Commissioner of the General Land Office to refuse the present application, I deem it unnecessary to prejudge, by the expression of a present opinion, other points involved in this case, which would arise if that officer were at liberty to act upon it: that is, the extent to which the donation clause of the second section of the act of 3d of March, 1819, above referred to, was meant to include the claims reported by Commissioner Crawford in list No. 10; how far the acceptance of a patent, under the circumstances stated, for the donation of twelve hundred and eighty acres, would interfere with a recognition of the claim under the other provisions of the act; and whether the evidence on which the claimants rely does or does not establish a valid British grant, and settlement, and cultivation, in 1783, by the person legally holding under it.

It is also proper to observe, that, as the claimants rely upon a title which is prior to the cession of Louisiana, it is as abundantly sufficient to secure to them all their rights, if they can establish it to be valid, as any act upon the part of the United States or their officers; and though it is of course improper to expose any party to the trouble of judicial investigation, where Congress has evidently provided for his case, yet there could be no justification for exercising a doubtful authority in a case where such a remedy is open.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

BONDS OF DEPUTY POSTMASTERS UNDER ACT OF JULY 4, 1840.

Deputy postmasters who shall be required to execute the functions of depositaries under the act of July 4, 1840, ought to give new bonds, with sureties, to be approved by the Solicitor of the Treasury.

Liability of United States for Fees of Circuit Court Clerks.

Instructions respecting the form and penalty of the bonds should be given through the Post Office Department.

ATTORNEY GENERAL'S OFFICE,
July 18, 1840.

SIR: I had the honor to receive your letter of the 17th instant, in which you inquire whether, under the 8th section of the act of 4th July, 1840, deputy postmasters are to execute new bonds; and if so, whether they are to be called on for the same directly by the Treasury Department, or, by it, through the Postmaster General.

In reply, I have to state that, in my opinion, the deputy postmasters who shall be required to execute the functions of depositaries under the act ought to give new bonds, suitable in their terms to the new and increased duties imposed upon them, and with sureties in sums such as shall seem reasonable and safe to the Solicitor of the Treasury. As the 8th section of the act is the only one which provides for this case, and as it imposes this duty specially on the Secretary and Solicitor of the Treasury, it must emanate from that department; but as it is evident, from the whole scope of the act, that the general superintendence of such of its provisions as are connected with the Post Office Department was intended to be vested in the Postmaster General, I am of opinion that the latter officer is the one through whom the necessary directions to the subordinate officers of that department should be given.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

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LIABILITY OF UNITED STATES FOR FEES OF CIRCUIT COURT CLERKS.

The United States are liable to clerks of circuit courts for their fees properly chargeable to plaintiffs, in suits in which the United States are plaintiffs, and the accounting officers may allow them, even though marshals may have collected them of defendants and have not paid them over.

In such cases the United States have recourse against marshals on their official bonds.

ATTORNEY GENERAL'S OFFICE,
July 20, 1840.

SIR: I had the honor to receive your letter of the 16th instant, enclosing one from the First Comptroller of the Treasury, rel-

Liability of United States for Fees of Circuit Court Clerks.

ative to certain costs stated to have accrued in favor of Duncan N. Hennen, clerk of the circuit court of the United States for the eastern district of Louisiana, in suits brought by the United States; and inquiring whether the United States are liable for such taxed costs as have not been collected by the marshal, or, being collected by him, have not been paid over.

In reply to the first inquiry, I have to state that I understand, under the long-established construction by the Treasury Department of the laws allowing certain costs to the several officers of the courts, and making appropriations for defraying the expenses of suits in which the United States are concerned, all the costs legally payable by a plaintiff in the courts of the United States, after being duly taxed and certified by the judges, are allowed by the accounting officers, and, if they cannot be made by execution out of the estate of the defendant, are paid by the United States. I see no ground whatever for expressing an opinion at variance with this established construction of the laws on the subject. Suitable regulations should be, and I presume are, made in all districts, to secure the payment of the costs by the defendants wherever it can be obtained.

In reply to your second inquiry, I have entertained considerable doubts whether, as the costs have been collected by the marshal, the officers entitled to them should not look to him and his sureties exclusively for payment. On reflection, however, I am satisfied that, as they are charges authorized by law for services actually rendered to the United States in pursuance of law, and falling within the designated class of "expenses of suits in which the United States are concerned," for which appropriation is made, the liability of the United States as plaintiffs does not cease until they are actually paid, or the officer is himself guilty of negligence in collecting them. The United States have their recourse against the marshal, and security for repayment in his official bond.

H. D. GILPIN.

TO the SECRETARY OF THE TREASURY.

PRE-EMPTIONS.

The rights of pre-emption, if otherwise mature, may be allowed to lands reserved from sale under the supposition that they fell within the limits of the grant in aid of the Milwaukie and Rock River canal, but subsequently found not to be included.

ATTORNEY GENERAL'S OFFICE,

July 25, 1840.

SIR: I had the honor to receive your letter of the 24th instant, enclosing a communication from the Commissioner of the General Land Office, and inquiring whether the eleventh section of the act of 18th June, 1838, precludes the allowance of a pre-emption claim on the land which was reserved from sale, as probably falling within the limits of the grant to the Territory of Wisconsin, in aid of the Milwaukie and Rock River canal; but which has been found, since the location of the canal, not to fall within those limits.

In reply, I have to say that, in my opinion, pre-emption rights may be allowed in such cases, when they are in other respects allowed by law.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

DATE OF OFFICE UNDER A NEW AND SECOND COMMISSION.

Where an officer appointed temporarily by the President is afterwards appointed by nomination, with consent of the Senate, his new appointment commences from the period of any official act indicating his acceptance of the office, whether it be a direct communication to that effect, or his taking the oath of office, or his giving a bond.

ATTORNEY GENERAL'S OFFICE,

July 27, 1840.

SIR: I had the honor to receive your letter of the 18th of June, enclosing a communication from the First Comptroller, and inquiring whether, in the case of a temporary appointment by the President alone being superseded by one made with the consent and advice of the Senate, the acceptance of the new appointment by the officer is to be considered as commencing

Confirmation of Sales of Creek Reservations.

with the date of his second commission, his oath of office, or his bond?

In reply, I have to state, that, in my opinion, it is to be dated from the period of any official act indicating the acceptance which first takes place, whether it be a direct communication from him to that effect, or his taking the oath of office, or his giving a bond.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

CONFIRMATION OF SALES OF CREEK RESERVATIONS.

Where Creek reserves died within the five years during which their reserves were to be withheld from sale, and the lawful administrators sold the reserves, and paid over the proceeds (less the expenses) to the Indian widows, as the heirs, and the question of other heirs being now raised, in opposition to the confirmation of the sales to the purchasers, who have paid the consideration money therefor once in full—DECIDED, that the purchasers are entitled to the confirmations which they ask, and should not be required to pay a second time any portion of the purchase money.

If the distribution of the proceeds was illegal, it ought in nowise to affect the *bona fide* purchasers.

ATTORNEY GENERAL'S OFFICE,
July 27, 1840.

SIR: I had the honor to receive your letter of the 6th instant, enclosing the papers relative to the application of McDougald and others for the President's confirmation of the sale to them of certain Indian reservations under the Creek treaty of 24th March, 1832, and requesting my opinion upon the points of difference between the Commissioner of Indian Affairs and Mr. Iverson, the agent of the applicants.

This difference arises out of the construction of that treaty and the act of 3d March, 1837. By the treaty, which was ratified on the 4th of April, 1832, it was provided that the Creeks should cede to the United States all their lands east of the Mississippi; that the United States should have the land surveyed as soon as could be conveniently done after the ratification of the treaty; and, when it was surveyed, should allow ninety of the principal Creek chiefs to select one section each, and every other head of a Creek family half a section; which

• Confirmation of Sales of Creek Reservations.

tracts were to be reserved from sale, for their use, for the term of five years, unless sooner disposed of by them; that the tracts might be conveyed by the persons selecting the same to any person, with the approval of the President, and under certain other regulations; and that, at the end of five years, the Creeks entitled to such sections, and desirous of remaining, should receive patents in fee simple from the United States. It will be perceived that no provision was made for the event of a Creek Indian, who had made a selection, dying without having made a sale before the expiration of the five years. To remedy this defect, among others, Congress, on the 3d March, 1837, passed a law by which they authorized the President to confirm sales by the widow, the widow and children, the children, or the lawful administrator of Creek Indians, who had died, or might die, before the 4th of April, 1837, without having legally disposed of their reservations. The President was, in such a case, "to receive the purchase money, or such portions of it as might not have been paid to the persons entitled to it, and to cause patents therefor to be issued to the purchaser"—provided that sales made by lawful administrators were to be entitled to a preference over sales made by widows and children.

The three cases embraced in the documents submitted to me are identical in the principal circumstances. They are sales made by the lawful administrators of Creek Indians who died before the 4th of April, 1837. The sales were made at the instance of the administrator, under the orders of the orphans' court of Russell county, in the State of Alabama, where the reservations were selected; they were approved by the court; the purchase money in each case was duly paid by the purchasers, Daniel McDougald and Luther Blake, into the hands of commissioners appointed by the court. On the administrator giving bond, it was paid over to him for distribution according to law; and, finally, he paid the whole amount, after deducting certain charges, with the sanction of the court, to the widow of the Creek reservee, "as his only heir and distributee;" it being proved by satisfactory evidence in each case that the reservee had no children. The purchasers now ask that the President of the United States should confirm the sale pursuant to the act of 3d March, 1837, and cause a patent therefor to be issued.

Confirmation of Sales of Creek Reservations.

From the statement which accompanies the report of the Commissioner of Indian Affairs, and which is among the papers submitted to me, it appears that the sale was, in the first instance, reported as illegal by the board appointed to examine the sales of Creek Indian reservations. The Commissioner now, however, remarks, that "further evidence has been filed since they made their report; the price is now shown to be fair; and it further appears that the deceased left no children, but a widow, to whom the net proceeds of the sale were paid; and the voucher has been received and approved by the orphans' court in which the cause is filed. This court had jurisdiction, and its decision is conclusive until reversed." The Commissioner then goes on to observe as follows: "Still, it is manifest the heir has not got the money; if the intestate had no children, he had relatives to whom, by the laws of Alabama, the amount of the sale would go; the widow being entitled to the interest of one half the net proceeds during her life. The ordinary estimate of human life is seven years. I would take the interest, for that period, of the one-half from the whole price (deducting expenses;) and, upon payment of the balance to the right heirs, would confirm the sale: and this I recommend."

Upon full reflection, I am of opinion that the purchasers are now entitled to the confirmations which they ask, and that they should not be required to pay a second time any portion of the purchase-money. The jurisdiction of the court, the fairness of the price, its payment to the administrator with the sanction of the court, and the award of it by that tribunal to the widow as the sole heir of the deceased and intestate Indian, do not form points of difference in this case as it is submitted to me. The objection is, that the mode in which the proceeds were subsequently distributed by the administrator, though with the approbation of the court, was illegal. Even if this were so, as the Commissioner of Indian Affairs considers it, (and upon which point it is unnecessary for me to express an opinion,) would it justify a refusal to confirm to the purchaser his *bona fide* purchase from the administrator? Would it authorize a second demand from him of the purchase-money, which he has already paid to the administrator from whom he bought,—and that, because the court directed or permitted, in

Coastwise Trade under Act Prohibiting Slave-Trade.

a subsequent stage of the proceedings, with which he had nothing to do, an erroneous or illegal distribution of the assets? I think not. If the widow was not entitled to the whole proceeds, nor the administrator warranted in paying them to her, the proper proceedings may be instituted against him by the other heirs, or under the authority which is given to the President of the United States by the act of 3d March, 1837, to receive such portion of the purchase money "as may not have been paid to the persons entitled to it." But I can see no ground, if such proceedings are necessary, for throwing them upon the purchaser, by the refusal of a patent, and not upon the heirs, or the government of the United States on their behalf.

H. D. GILPIN.

To the SECRETARY OF WAR.

COASTWISE TRADE UNDER ACT PROHIBITING SLAVE-TRADE.

Steamboats and other vessels passing on any river or inland bay of the sea, within the jurisdiction of the United States, are not subject to the regulations provided in respect to exterior voyages, or those along the seacoast, or in open bays of the sea.—(See opinion of 16th April, 1840.)

ATTORNEY GENERAL'S OFFICE,
July 29, 1840.

SIR: I had the honor to receive your letter of the 28th instant, enclosing letters from Senators Henderson and King, and certain documents from the collector at Mobile, relative to the construction given by me, in my letter to you of the 16th of April, 1840, of the act of 2d March, 1807, and requesting such further views on the subject as I may deem proper to present.

In reply, I have to state that, on examining these papers, I find they present nothing that conflicts with the legal principles laid down by me in regard to the construction of the act; but they are intended to show that the *facts* of the case do not warrant the Treasury Department in applying those principles to the particular voyages referred to. Upon questions of fact,

Coastwise Trade under Act Prohibiting Slave-Trade.

I cannot express an opinion. This must be left to the proper officers having charge of the particular case.

In my letter of the 16th April, 1840, I have given this construction to the eighth and ninth sections of the act of 2d March, 1807: that the object of the act was to prevent the foreign slave trade, but not to interfere with the interior transportation of slaves in the United States, or with passengers going with their slaves from place to place on an interior route; that, therefore, the act authorized a person to carry his negroes in any vessel whatever, "on any river or inland bay of the sea, within the jurisdiction of the United States," without subjecting him to the regulations provided in regard to exterior voyages, or those along the seacoast, or in *open* bays of the sea; that I considered vessels plying on the route designated as coming within the former description, because they were represented in the papers submitted to me as passing exclusively through a succession of lakes and bays which were separated from the sea along their whole extent by a range of islands, the channels between which only admit the entrance of vessels of a very small draught, and which route would not be used by vessels entering ports of the United States from the sea.

The soundness of this construction upon the legal points is not, as I understand, controverted; but it is now said that the route in question is, through a considerable part of it, outside of the chain of the islands; that this chain is not contiguous; and that the draught of water permits, in various places along the route, the entry of large vessels coming from sea. Upon these disputed facts I cannot undertake, or be expected, to express an opinion. The construction I give to the law is confined exclusively to routes which are, in reality, on "rivers and inland bays of the sea;" the provisions of the act referred to were certainly not intended to apply to routes which do not fall within that description.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Power of Secretary of Treasury to Refund Excess of Duties.

POWER OF SECRETARY OF TREASURY TO REFUND EXCESS OF DUTIES.

The Secretary of the Treasury has no power, under any law now existing, to refund moneys deposited for duties with a collector, but which are ultimately found to exceed the amount of duties properly chargeable.

ATTORNEY GENERAL'S OFFICE,

July 29, 1840.

SIR: I had the honor to receive your letter of the 25th of June, in which you inquire whether the sum of \$64 30 received in January, 1838, from Messrs. H. W. T. and H. Mali, of New York, beyond the amount of duties due from them, can be repaid.

It appears that these persons then made a deposite of \$275 with the collector, to cover the amount of cash duties on certain merchandise entered by them, and that, on estimating the duties, it exceeded what was properly chargeable by the above amount. They allege, as a cause for the delay in applying for a repayment, that the certificate of deposite was mislaid, and but lately recovered. The present collector states that money so received was never passed to the credit of the United States, nor was deemed public money, until the duty was ascertained, when the proper sum was credited; and he and the Comptroller both consider it as an accommodation allowed to the merchant at his own risk, by which he was enabled to obtain possession of his merchandise without delay.

On these points your inquiry does not make it necessary to express my opinion; for, in whatever light the deposite is considered, and whether or not Messrs. Mali have a right to look to the United States for repayment, I am aware of no law which confers a power on the Secretary of the Treasury now to pay them out of the treasury. He can only do so under the authority of future legislation.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Priority of Claim of Winnebago Reservees, &c.

COLLECTORS' BONDS UNDER ACT OF JULY 4, 1840.

Collectors who are made depositaries of the public moneys under the act of 4th July, 1840, are required to execute a new bond, with sureties, conditioned for the performance of the new duties required by said act, as well as those before required.

ATTORNEY GENERAL'S OFFICE,
July 31, 1840.

SIR: I had the honor to receive your letter of the 29th instant, enclosing a correspondence between the First Comptroller of the Treasury and the collector of customs at New York, and requesting my opinion on the correctness of your instructions, by which the latter has been required to give a new bond in conformity to the provisions of the eighth section of the act of 4th of July, 1840.

In reply, I have to say that, in my opinion, your instructions are correct.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

PRIORITY OF CLAIM OF WINNEBAGO RESERVEES TO THAT OF CERTAIN POLISH EXILES.

The approval by the President of the location of certain lots by reservees under the Winnebago treaty of 1st August, 1829, vests a title in the reservees, that is superior to that of certain Polish exiles who located 18th April, 1836, under act of 30th June, 1834.

ATTORNEY GENERAL'S OFFICE,
August 1, 1840.

SIR: I had the honor to receive your letter of the 30th of July, enclosing certain papers relative to the location of two sections of land reserved to James and Simeon, two of the children of Mauk-nah tee-see, by the fifth article of the Winnebago treaty of 1st of August, 1829, and inquiring whether the approval of the President of that location, on the 8th of June, 1838, vests the title of the reservee, notwithstanding the fact that the two sections so located are included in the selections made on the 18th of April, 1836, by certain Polish exiles, under

Patents to Creeks who have Removed into Georgia.

the act of 30th of June, 1834, but which were never definitively or formally approved by the Secretary of the Treasury or the Commissioner of the General Land Office.

In reply, I have to state, that it appears from the papers submitted to me that a question exactly similar was presented to my predecessor Mr. Butler, when Secretary at War *ad interim*, in regard to a location made under the same circumstances, by Catherine Myott, another of the reservees under the same treaty. In that case, it is stated in the letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office, dated 20th of February, 1837, that "the objection arising from previous selections for the Polish emigrants, of sections thirteen and fourteen, township forty four, range one east, had been submitted to the Secretary of War, who was of opinion that the rights of the reservees are not thereby in any degree impaired." In consequence of this decision, the location of the reservee was confirmed, and notice given to, and a new selection of a corresponding quantity made by, the agent of the Polish exiles.

Unless there is some essential variation between that case and the one now before me, which I do not perceive, the point you submit should be regarded as decided. If there is any such variation, and you will have the goodness to apprise me of it, I will examine the case more fully.

H. D. GILPIN.

To the SECRETARY OF WAR.

PATENTS TO CREEKS WHO HAVE REMOVED INTO GEORGIA.

Heads of Creek families who otherwise would be entitled to a patent for land in Alabama, have not forfeited their right to the same by having become residents and citizens of Georgia, before the expiration of five years from the time when his reservation was selected.

ATTORNEY GENERAL'S OFFICE,

August 3, 1840.

SIR: I had the honor to receive your letter of the 31st July, enclosing a communication from the Commissioner of Indian Affairs, with certain papers relative to the claim of Dick Spiller, a head of a Creek family, for a patent under the fourth article

Collectors' Bonds under Act of July 4, 1840.

of the Creek treaty of the 24th of March, 1832, and inquiring whether the fact of his having become a citizen and resident of Georgia, before the end of five years from the time when his reservation in Alabama was selected and set apart to him, precludes him from receiving a patent therefor, now that the five years are expired.

In reply, I have to say that I concur with the Commissioner of Indian Affairs in the view of the case which he has submitted to you; and am of opinion that the fact above stated does not preclude the right of the Indian to a patent for his reservation, if he is entitled to receive it in other respects, and if he exhibits satisfactory evidence of his having remained east, and of his desire still to do so.

H. D. GILPIN.

To the SECRETARY OF WAR.

COLLECTORS' BONDS UNDER ACT OF JULY 4, 1840.

Collectors are not required to give bonds in a larger amount than before under the act of July 4, 1840, unless it shall be deemed necessary by the proper officers of the department; but they are required to give new bonds with new conditions embracing the new duties devolved upon them, as well as those previously required.

ATTORNEY GENERAL'S OFFICE,
August 24, 1840.

SIR: I had the honor to receive your letter of the 6th instant, relative to the opinion expressed by me on the 31st July, as to the propriety of the collector of the port of New York giving a new bond to embrace the duties and responsibilities that may devolve upon him under the provisions of the act of 4th of July, 1840, and enclosing a letter from Mr. Hoyt on the subject.

In compliance with your request, I have carefully considered Mr. Hoyt's remarks, but am unable to feel myself warranted in advising a deviation from the course which has been decided, and, as I understand, already acted upon by your department in other similar cases.

On one suggestion of Mr. Hoyt's it may be proper for me to

Compensation of Officers of the Customs.

say a word. He observes that he is already under bond for \$200,000, and that to require him to give a new bond in the sum of \$200,000 is somewhat oppressive—evidently understanding that the new bond is *in addition* to the former. I am of opinion that such an *additional* bond is not required by the act of July 4, 1840, but merely a *new* bond which shall embrace the new duties and responsibilities that may be devolved on the collector, as well as those previously required of him; and the amount of which need not exceed his present security, if that sum is such as seems reasonable and safe to the proper officers of the department.

H. D. GILPIN.

TO the SECRETARY OF THE TREASURY.

COMPENSATION OF OFFICERS OF THE CUSTOMS.

The compensation of officers of the customs is to be regulated and graduated by the importations of the present year; the act of July 21, 1840, merely substituting the present for the year 1838.

ATTORNEY GENERAL'S OFFICE,

August 26, 1840.

SIR: I had the honor to receive your letter of the 11th instant, relative to the construction of the seventh section of the act of July 21, 1840, which revives the third section of the act of July 7, 1838; and inquiring whether the payments to the officers of the customs, therein referred to, are to be regulated by the importations of the present year, or by those of 1838.

In reply to this inquiry, I have to state that, in my opinion, it was the intention of Congress that the allowance should be regulated by the importations of the current year. The part of the third section of the act of July 7, 1838, which is referred to, authorizes the Secretary of the Treasury to pay the officers of the customs who are designated such sums as will give them, respectively, "the same compensation in the year 1838, according to the importations of that year, as they would have been entitled to receive if the act of July 14, 1832, had not gone into effect." In reviving this provision, the seventh section of the act of July 21, 1840, declares that it is "re-

Compensation to Navy Agents for Extra Services.

vived and continued in force for the year 1840, and until otherwise directed by law." The obvious intention of this is to substitute for the year 1838 the year 1840, and to make an allowance for the latter, corresponding in its character with that which had been made for the former—that is, an allowance graduated on the current importations. To suppose that the allowances for one year were to be graduated by the importations of another, would be in direct variance from such intention, and make the provision of 1840 essentially different in its nature from that of 1838, with which it was intended to conform. If any doubt could exist upon this point, from the language of the present act, it would be removed by observing that a provision exactly similar is found in the acts of March 2, 1833; June 27, 1834; March 3, 1835; July 4, 1836, and March 3, 1837; and in each the compensation is graduated by the importations of the current year.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

COMPENSATION TO NAVY AGENTS FOR EXTRA SERVICES.

Navy agents employed to make purchases, or to perform any services for a department other than the Navy Department, are not entitled to extra compensation unless compensation for the extra services is expressly authorized by law.

ATTORNEY GENERAL'S OFFICE,

October 3, 1840.

SIR: I had the honor to receive the letter of Mr. Stubbs, written by your direction, and inquiring whether a navy agent, employed to make purchases or perform any services for a department other than the Navy Department, can be allowed a commission or compensation for such services.

The third section of the act of March 3, 1839, provides "that no officer in any branch of the public service, or any other person, whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless

Compensation to Judges for Extra Services.

the said extra allowance or compensation shall be authorized by law." The construction of this section, as given by my predecessor (Mr. Grundy) in his opinion of the 4th April, 1839, was—"First, that in case of any general appropriation of a sum of money for the accomplishment of any object, no part can be paid to a person receiving an annual salary, or pay and emoluments fixed by law, for any service he might render in relation to it, which services are not directed to be paid for by the act. Secondly, that no portion of the contingent fund of a department can be applied to the payment for extra services rendered by any person receiving an annual salary, or whose pay or emoluments are fixed by law; because no particular services are designated in the acts making such appropriations, to which the money, or any part of it, is to be applied."

If, therefore, the services to which you refer are not those which come properly within the duties of the navy agent, or those for which an allowance or compensation is expressly authorized by law, I am of opinion that it cannot be given.

H. D. GILPIN.

To the SECRETARY OF STATE.

COMPENSATION TO JUDGES FOR EXTRA SERVICES.

Extra compensation to the judge of the superior court at St. Augustine, for examining and adjudging certain cases of claims, cannot be allowed, as there is no appropriation for the services, and no provision for their payment, in the act requiring them.

ATTORNEY GENERAL'S OFFICE,

October 21, 1840.

SIR: I had the honor to receive your letter of the 24th September, relative to the allowance to be made to Judge Reid for services performed under the act of 26th June, 1834, and inquiring whether the 3d section of the act of 3d March, 1839, has precluded a continuance of the allowance.

The third section of the act of 3d March, 1839, provides "that no officer in any branch of the public service, or any other person, whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allow-

Compensation to Judges for Extra Services.

ance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation shall be authorized by law." The construction of this section, as given by my predecessor (Mr. Grundy) in his opinion of the 4th of April, 1839, was—"First, in case of any general appropriation of a sum of money for the accomplishment of any object, no part of it can be paid to a person receiving an annual salary, or pay and emoluments fixed by law, for any services he might render in relation to it, which services are not directed to be paid for by the act. *Second*, that no portion of the contingent fund of a department can be applied to the payment for extra services rendered by any person receiving an annual salary, or whose pay or emoluments were fixed by law; because no particular services are designated in the acts making such appropriations, to which the money, or any part of it, is to be applied."

This opinion has since formed the invariable rule, so far as I am aware, in the allowance to officers receiving salaries, or compensation, for any services they may perform, in addition to those which are embraced within their regular official duty.

The act of 26th June, 1834, which requires the judge of the superior court at St. Augustine to receive, examine, and adjudge the cases of claim therein referred to, does not provide or authorize any payment therefor. Nor is there any appropriation by law for the payment of these services, or any clause in the general appropriation acts which refers to it, or provides for them. Previous to the passage of the act of 3d March, 1839, they were paid for under the clause in the general appropriation law which set apart a certain sum "for the discharge of such miscellaneous claims against the United States, not otherwise provided for, as shall be ascertained and admitted in due course of settlement at the treasury." It will be seen that, under the above construction given to the third section of the act of 3d March, 1839, and since uniformly adopted, such payment cannot be made, since its passage, out of that fund, to an officer receiving a salary fixed by law, where such services are not expressly directed to be paid for.

Being sensible of the force of the views taken by Governor

Transfer of Stocks from the Chickasaw to the Choctaw Fund.

Reid in his communication submitted with your letter, I have given to them very deliberate consideration; but I have been unable to bring myself to the opinion that, under the settled construction which has been given to the act in question, in regard to the payment of extra compensation to salaried officers, the payment for which he applies can be made by the department, without additional authority from Congress.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

TRANSFER OF STOCKS FROM THE CHICKASAW TO THE CHOCTAW FUND.

The Chickasaw invested stocks belonging to the fund created by the treaty of 20th October, 1832, cannot be transferred to the Choctaws in payment of the land purchased of them, without the previous consent of the President and Senate.

The general assent of the President and Senate to the stipulations of the convention between the Chickasaws and Choctaws, by which the former were to pay the latter five hundred and thirty thousand dollars, cannot be regarded as such an assent as to authorize an application of the funds of the Chickasaws to the payment suggested.

ATTORNEY GENERAL'S OFFICE,
November 12, 1840.

SIR: I had the honor to receive your letter of the 29th October, relative to the proposed transfer of stocks, to the amount of \$500,000, from the Chickasaw fund, created by the treaty of 20th October, 1832, to the Choctaws, in payment of the land purchased from them; and inquiring whether, under the 13th article of the treaty of 24th May, 1834, and the third article of the convention of 17th January, 1837, between the Chickasaws and Choctaws, such transfer can be made without the previous consent of the President and Senate.

The 11th article of the Chickasaw treaty of the 20th October, 1832, provided that a fund should be created for the benefit of that tribe, by investing three fourths of the net proceeds derived from the cession of their lands to the United States, "in some safe and valuable stocks," which might bring them in an annual dividend; this investment being made "under the direction of the President of the United States, by and with

Transfer of Stocks from the Chickasaw to the Choctaw Fund.

the advice and consent of the Senate." It was further provided, that if, for any valuable national purposes, it should become requisite to draw out a portion of the sum so invested, the same might be done "by the consent of the President and Senate." The thirteenth article of the Chickasaw treaty of the 24th May, 1834, (which was made when that tribe were about actually to leave the lands so ceded,) provides, that if they should be so fortunate as to procure a home within the limits of the United States, then, "with the consent of the President and Senate," so much of their invested stocks as might be necessary to the purchase of a country for them to settle in should be permitted to be sold; or the United States would advance the necessary amount, on a guaranty and pledge of an equal amount of their stocks. On the 20th January, 1836, the Senate adopted a resolution approving of the investment of the net proceeds arising from the ceded lands, in a manner recommended by the Secretary of the Treasury; and, on the 20th April following, an act of Congress was passed, by which all the investments in stocks required to be made by these treaties were directed to be made under the direction of the President; a special account of them was to be kept at the treasury, and a statement thereof annually laid before Congress; but no provision was made for drawing out any portion of the sum so invested, or for selling or transferring any of the invested stocks. On the 17th January, 1837, a convention was made between the Choctaws and the Chickasaws, by which the former gave to the latter the privilege of forming a district within the limits of their country; and, as a consideration for such privilege, it was agreed that the Chickasaws should pay the Choctaws the sum of five hundred and thirty thousand dollars; of which, thirty thousand dollars were to be paid to the Choctaws at the time and in the manner that their annuity for 1837 was paid, and the remaining five hundred thousand dollars were to be invested in some safe and secure stocks, under the direction of the government of the United States, who were to cause the interest arising therefrom to be paid annually to the Choctaws. This convention is made "subject to the approval of the President and Senate of the United States;" and it is stated by the Commissioner of Indian Affairs that it "was ratified on the 24th

Transfer of Stocks from the Chickasaw to the Choctaw Fund.

March, 1837, in the same manner and with the same solemnities that sanction treaties." Of this fact, however, I find no notice in the published executive journal of the Senate; nor does the convention itself appear to have been proclaimed by the President; nor is it inserted in the volume of the laws with the other Indian treaties made before and since. It should also be observed, that the session of the Senate in March, 1837, closed on the 10th of that month. The terms of the convention have been so far complied with, as that the sum of thirty thousand dollars has been duly paid to the Choctaws; but the residue, of five hundred thousand dollars, has not yet been paid, or the investment made; nor has any act in relation to it been passed by Congress, or any thing further been done by the President or Senate.

It appears by the report of the Commissioner of Indian Affairs that an actual sale at present of so much of the Chickasaw invested stocks as would be necessary to raise \$500,000, would probably require not much less than \$750,000 of those stocks "to be drawn out; and that these, or others, would have to be repurchased for the Choctaws at a considerable reduction—being a loss to one tribe, and a benefit to the other, not contemplated, it is presumed, by either of themselves or by the President and Senate, when the convention was approved." The Commissioner, therefore, being of opinion (and I think very correctly) that a sale of the Chickasaw stocks at present would be unjust to them, and not conformable to the intention of the contracting parties, suggests that a transfer of those stocks to the requisite amount, at their par value, might be now made to the Choctaws; provided the approval stated to have been already given by the President and Senate on the 24th March, 1837, to the convention of the 17th January, 1837, can be regarded as an expression of their consent to such an application of the invested stocks.

In compliance with your request, I have given to the subject an attentive consideration. Without having before me the exact terms of this approval, it is impossible to express an opinion as to its effect; but, taking the statement of the Commissioner of Indian Affairs in regard to it, I presume it is merely a general assent to the stipulations of the convention, expressed four

Notice of Application for Extension of Patents for Inventions.

years ago, just after its terms were agreed on between the two tribes. If so, I am of opinion that it is not an act which can be regarded as such an assent on the part of the President and Senate to the withdrawal or sale of the Chickasaw investments, as is required either by the 11th article of the Chickasaw treaty of 20th October, 1832, creating the fund, or by the 13th article of that of 24th May, 1834, which authorizes the application of a portion of it to the purchase of a new home. Both those articles appear to me to contemplate the consent of the President and Senate as being given with a full knowledge of all the circumstances attending the alteration or diminution of the investment; they are its especial guardians; and they are not only to judge of the propriety and mode of interfering with it, but they are to decide whether such interference is more or less expedient than an advance of the necessary amount from the treasury of the United States on a pledge of the stocks—an alternative provided by the treaty for the very event which has now occurred. The fact of the great depreciation in the value of the stock, and the consideration how far it should be drawn, on the one hand, from the Chickasaw fund, at a heavy sacrifice, or be given, on the other, to the Choctaws, at a higher valuation than it bears in the market, are certainly circumstances that must materially affect this consent, and influence the adoption of either of the modes contemplated by the treaty. In the general and formal approval of the convention for the sale of the land four years since, they were not, of course, taken into view; and that approval, therefore, cannot now be regarded as such a consent as the terms of both treaties require.

H. D. GILPIN.

To the SECRETARY OF WAR.

NOTICE OF APPLICATION FOR EXTENSION OF PATENTS FOR INVENTIONS.

Applications for extensions of patents for inventions must be made to the Commissioner a sufficient time before the expiration of the term for which they were issued, to enable him to give the notice contemplated by the act of 4th of July, 1836, to the public in that section of the country most interested adversely to them.

Notice of Application for Extension of Patents for Inventions.

Patentees who neglect to make seasonable applications for extensions must forego the advantages which such extensions confer.

ATTORNEY GENERAL'S OFFICE,

November 21, 1840.

SIR: I had the honor to receive the letter of the Commissioner of Patents, dated this day, with accompanying documents, relative to the application of William Gale for a renewal of the patent issued to him on the 7th December, 1826; and have considered your inquiry whether a sufficient time remains, previous to the expiration of the term for which it was originally issued, to enable the Commissioner to give the notice of the application which is required by the eighteenth section of the act of 4th of July, 1836.

In reply, I have to state that, in my opinion, the period that will elapse before the expiration of this patent is not sufficient to allow the notice contemplated by the provisions of the act. They direct that, "whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the Commissioner of the Patent Office, setting forth the grounds thereof; and the Commissioner shall, on the applicant's paying the sum of forty dollars to the credit of the treasury, as in the case of an original application for a patent, cause to be published in one or more of the principal newspapers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent, a notice of such application, and the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted." The proviso at the close of the same section directs "that no extension of a patent shall be granted after the expiration of the term for which it was originally issued."

The object of these provisions is, while a special privilege may be extended to a patentee for his own peculiar benefit, to protect the public, and to guard against such an extension being allowed, without securing an opportunity to every citizen to appear and oppose it. For this purpose, the duty of publishing a notice of the application, and of the time and place

Confirmation of Sales of Certain Creek Reservations.

of its consideration, is specially imposed on the Commissioner of Patents. It is expressly directed that such notice shall be published wherever an adverse interest is supposed to exist. The improvement patented by Mr. Gale relates to a branch of manufacture carried on in every part of the United States. To give any notice whatever of the application, in some districts, is now scarcely practicable. To give such notice as it was evidently the intention of Congress to require, is certainly impossible. Had the patentee made the application (which rested entirely with him) at a proper time, the object of Congress would have been attained, and he might have secured the privilege he seeks, without detriment to the public; as it is, it is evident that, were it now accorded, it might be to the detriment of the community, arising from a neglect on his own part to comply with a provision, of which he cannot be presumed to have been ignorant, and for which he offers no reason whatever.

H. D. GILPIN.

To the SECRETARY OF STATE.

CONFIRMATION OF SALES OF CERTAIN CREEK RESERVATIONS.

The President of the United States may properly confirm sales of Creek reservations made by administrators pursuant to the orders of courts having jurisdiction, whether the distribution of the proceeds among the heirs shall have been correctly made or not; provided the purchasers shall have paid in the purchase-money in good faith to the administrators or legal representatives.

But where purchasers have withheld any portion of the purchase-money on any pretence, or the administrators themselves were the purchasers, and have not accounted for the purchase-money, sales ought not to be confirmed.

ATTORNEY GENERAL'S OFFICE,

December 3, 1840.

SIR: I had the honor to receive your letter of the 24th of November, enclosing the papers relative to a confirmation by the President, in pursuance of the act of 3d of March, 1837, of four sales of certain Indian reservations under the Creek treaty of 4th of April, 1832; and requesting my opinion as to the correctness of the decision of the Commissioner of Indian Affairs in relation thereto.

In my letter to you of the 27th of July, 1840, relative to the

Confirmation of Sales of Certain Creek Reservations.

proper construction of that treaty and of the same act of Congress, I expressed the opinion, that, in cases where sales of these reservations have been regularly made by order of the orphans' court of Alabama, and there is no question as to the jurisdiction of the court, the fairness of the price, and its payment to the administrator with the sanction of the court, a *bona fide* purchaser is entitled to the confirmation he asks, without being made answerable for the proper subsequent distribution of the assets by the administrator; there being no authority to throw this duty on the purchaser by withholding his patent, instead of the heirs themselves, or the government of the United States on their behalf.

In the cases of John G. Worsham against the heirs of Nocose Yoholo, and William Redd against the heirs of Hatch-ke-zee, the Commissioner of Indian Affairs, in his reports transmitted with your letter, does not object to the confirmations on any of the grounds above referred to. He objects in the former case, because there is evidence making it probable that the administrator has not paid over to the heirs of Nocose Yoholo the whole sum received by him; and in the latter, because the distributive portion of a minor child of Hatch-ke-zee yet remains in the hands of the guardian; and also because a sum of \$300, part of the purchase money, never was paid to the commissioners appointed by the orphans' court, or to the administrator, but to a person claiming to be entitled to that sum under a contract alleged to have been made with the intestate in his lifetime, but which does not appear to have been proved or allowed in any settlement of the intestate's estate. The Commissioner thinks that the sales should not be confirmed to the purchasers until all these payments shall have been made. I am of opinion that the sale in the latter case ought not to be confirmed until payment of the above \$300 shall be "received," as the act of Congress requires, or until it be satisfactorily shown that the whole purchase-money, including the above \$300, has been paid to the administrator or the legal representatives of the deceased; but I think the payments, under the sanction of the court, of the distributive share of the minor child of Hatch-ke-zee to its legal guardian, and of the whole amount (except costs) of the purchase-money to the administrator of Nocose

Confirmation of Sales of Certain Creek Reservations.

Yoholo, are sufficient to remove any objection to the confirmations in those respects, so far as the purchaser is concerned. It is the duty, not of him, but of the United States, to see that the guardian and administrator discharged their obligations to the Indians by a proper disposition of the assets.

In the case of John Sims against the heirs of Han-lop-ho-kee and the heirs of Tap-pe-nay, it appears that the administrator was himself the purchaser; and there is no evidence of his having accounted for the purchase-money, settled his administration account, or paid over the money to the heirs of the deceased, or any persons legally entitled thereto. These facts are regarded by the Commissioner of Indian Affairs as sufficient to warrant a present refusal to confirm the purchase. In my opinion, they are so. The act of Congress authorizes the President to confirm sales made by an administrator only on his "receiving the purchase money," or being satisfied that the administrator has "paid it to the persons entitled to it." This, I think, requires an actual payment by the purchaser, either to the United States or to the representatives of the deceased. If there be no positive legal objection under the law of Alabama to a sale of an intestate's estate to his own administrator, it would yet open a door to the greatest irregularity if a mere retention of the purchase money by the purchaser, at a sale made at his own instance, were to be construed into a "payment to the persons entitled to it." I am of opinion, therefore, that these sales should not be confirmed until the purchase-money is received by the President of the United States, or until it is satisfactorily shown that the administrator has paid it over to the representatives of the deceased Indian, or accounted for it in the legal settlement of his administration account.

H. D. GILPIN

To the SECRETARY OF WAR.

Compensation for Extra Services.

COMPENSATION FOR EXTRA SERVICES.

The district attorney for the District of Columbia is entitled to a reasonable compensation, over and above his salary and stated fees, for attending, on the part of the United States, during the taking of certain depositions in said District in a case depending in the circuit court of Missouri.

ATTORNEY GENERAL'S OFFICE,
December 5, 1840.

SIR: I had the honor to receive your letter of the 30th November, 1840, relative to the claim of \$60, presented by the attorney of the United States for this District, for attending, on behalf of the United States, during the taking of certain depositions in this District in a case pending in the circuit court of Missouri; and inquiring whether the same can be allowed, consistently with the third section of the act of 3d March, 1839.

The services were performed by the district attorney, under the direction of the Solicitor of the Treasury, who so instructed him at the instance and with the approbation of the Secretary of War, the head of the executive department in which the case in question arose; that officer deeming them indispensable, as they unquestionably were, for the protection of the interests of the United States. The allowance, under such circumstances, of such suitable compensation as the head of the executive department shall approve, is fully sanctioned by judicial decisions. Its propriety cannot, therefore, be doubted, unless the officer in question is precluded from receiving it by the third section of the act of 3d March, 1839.

In my letter to you of the 21st October, I adverted to the opinion of my predecessor of the 4th of April, 1839, as laying down the rule which has since been invariably adhered to, so far as I am aware, in the construction of that section. He expressed the opinion that it was only in cases where an act of Congress directed the payment for certain services, that there was any legal authority to allow them to be paid for out of a general appropriation to a person receiving an annual salary, or pay and emoluments fixed by law. Is there such a legal authority for the payment of these services? In my opinion, there is. The act of the 3d March, 1839, makes a general appropriation of \$128,000 for the expenses of the judiciary estab-

Collectors' Bonds, under Act of July 4, 1840.

lishment, and then goes on expressly to authorize the payment from it of the "expenses of suits in which the United States are concerned." This designation certainly embraces such services as those now in question. Without going into a minuteness of detail, which is impossible, such services could not have been more clearly designated.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

COLLECTORS' BONDS, UNDER ACT OF JULY 4, 1840.

Under the act of July 4, 1840, all collectors of customs are required to execute bonds embracing, in terms, the new duties to which they are or may be subject. Even at ports where there is a receiver general, there are some new and increased fiscal duties imposed on the collector which did not previously belong to him. If the proper department shall deem it expedient, it may, in lieu of a new bond, embracing all the duties of the collector, take a new bond in a suitable penalty, embracing the new duties only, leaving the old one outstanding.

ATTORNEY GENERAL'S OFFICE,

December 7, 1840.

SIR: I had the honor to receive your letter, enclosing that of the collector of Boston, and inquiring whether, under a proper construction of the seventh and eighth sections of the act of 4th July, 1840, the department could dispense with a new bond from that officer, as the additional duties imposed by that act on depositaries of public moneys are not actually or necessarily performed by the collectors of the customs at places where an office of receiver general or treasurer of the mint is established, and because it is regarded as doubtful whether collectors at those places are "depositaries," within the proper meaning of that act.

In a previous communication, having reference to the collector of New York, (where, as at Boston, there is a receiver general,) I expressed the opinion that the act required a *new* bond to be executed, embracing, in terms, the new duties and responsibilities to which the collector might be subject. I have carefully reflected upon the ground taken by that officer, that he has performed no additional duties since the passage of the act; and that, in fact, the responsibilities have been lessened

Collectors' Bonds, under Act of July 4, 1840.

by the establishment of the office of receiver general. It has not, however, satisfied me that my previous view is incorrect. The reason may show (as it undoubtedly does) that a new bond has not been necessary for the security of the United States, but not that the department is authorized to dispense with such an instrument.

The eighth section of the act of July 4, 1840, positively directs the execution of new bonds, suitable in their terms to meet any new and increased duties imposed by that law on any existing officer, and to cover any new responsibilities arising under that or any other act of Congress. Previous to its passage, the collectors of customs were required to "receive all moneys paid for duties, and to take bonds for securing the payment thereof; and to pay to the order of the officer who shall be authorized to direct the payment thereof, the whole of the moneys which they might respectively receive, [such moneys only excepted as they were otherwise by law directed to pay;] and once in every three months, or oftener if required, to transmit their accounts for settlement to the proper officer." These provisions made them, in regard to public moneys, mere collecting officers; they were not depositaries; the money stood to their individual credit as collectors, until it was paid over to the Treasurer of the United States. The sixth section of the act of July 4, 1840, declares that *all* collectors of customs (making no exception whatever) shall keep safely, without loaning or using, all public money collected by them, and all public money at any time placed in their possession and custody; and faithfully and promptly make transfers and payments thereof, as directed by the proper department or officer of the government; and do and perform all other duties as fiscal agents of the government, imposed on them by law or any lawful regulation of the Treasury Department; and do and perform all duties required by law, or by direction of either of the executive departments, as agents for paying pensions, or for making any other disbursements which the departments might lawfully require, and which were of a character to be made by the depositaries constituted by that act. It is also declared that it shall be the duty of the collectors of customs to receive, at stated periods, certain proportions of the public moneys col-

Collectors' Bonds, under Act of July 4, 1840.

lected by them, in the currency therein designated, and in no other; it is declared that, if they shall themselves use or loan any portion of the public money, they shall be liable to punishment for a felony; and in various sections, various provisions are introduced, and details of official duty are prescribed, which necessarily arise out of these changes in the character of the office.

It cannot be denied that these enactments create, in the language of the law, new and increased duties, and impose a new "responsibility arising under this act of Congress," which did not previously belong to the office of collector of the customs. Indeed, this is admitted to be the case everywhere, except at places in which there may be a receiver general or a treasurer of the mint. It is contended that, where these offices exist, the new and increased duties and the additional responsibilities are not imposed on the collectors of customs, but that their character and functions remain in every respect the same as they were before the passage of the law of the 4th July, 1840. To this it may be answered, in the first place, that the words of the act make no exception, but embrace in terms *all* collectors of customs whatever. It would require a very strong evidence of the intention of the legislature, derived from the clear provisions of the rest of the act, to authorize the inference that the exception in question was intended; it would seem, indeed, to require that the imposition of these new duties and responsibilities on the collectors of customs so situated should be evidently inconsistent with the other provisions of the act, before we could justify ourselves in relieving these officers from them, in the face of the language directly including them. But, independently of this consideration, I am at a loss to perceive why the mere fact of there being a receiver-general, or treasurer of the mint, at a particular place, is to be regarded as freeing the collectors of the customs from these additional responsibilities. Some of these, it is evident, certainly attach to such collectors as well as to others—such as their obligation to keep the public money without loaning or using it; to hold it as public depositaries, from the moment it comes into their hands, and to collect it in certain and specified proportions; and, although it is true that the scope and language of the law impose the

general fiscal agency on the receivers-general and treasurers of the mint at places where they are situated, yet, as the public service might, in some emergencies, require that some portions of such agency should be performed by the collectors at those places as well as at others, a provision for that contingency seems to be within the spirit of the law, as it certainly is within the terms. The whole scope of the act, as I understand it, is to impose upon all officers intrusted with public money increased responsibility, under additional safeguards, from the moment it comes into their hands, and to make them all subject to the performance of such fiscal agencies as the public service may require. The very breadth and extent of this exclude the idea that all the agencies and duties thus provided for should be at all times performed by each functionary; but do not afford any ground for neglecting to provide for their performance, if necessary, under all the securities that the law contemplates.

I am aware that some reliance has been placed on the language of the eighth section, which confines these new bonds to "the several *depositories* mentioned in the act, whose official bonds are not expressly provided for;" and the opinion is entertained, that the collectors at places where there are receivers-general or treasurers of the mint are not such depositories. To this it may be answered, in the first place, that the sixth section (and it is the only section previous to the eighth in which any other depositories than the receivers-general and treasurers are referred to) directs *all* collectors "to keep safely, without loaning or using, all public money collected by them, or otherwise at any time placed in their possession or custody;"—language than which no other can more clearly define, describe, or constitute "a depository." But, again: it is the same sixth section, and that only, which constitutes any collectors of customs as depositories; and if we exclude from this class of officers the collectors of New York and Boston, we must either draw a distinction between them and the other collectors, (which the words of the sixth section give no warrant for,) or we must assert, in direct contradiction to the eighth section, that no collectors whatever are depositories. Nor are these considerations, taken from the language of these sections, the only ones which

Collectors' Bonds, under Act of July 4, 1840.

make it evident to my mind that these collectors are embraced within the term "depositories." I think so, because the eighth section, and indeed the whole scope of the law, evidently meant that wherever a new duty was required, or a new responsibility imposed, a suitable alteration or addition should be made to the bond. As before observed, there are, unquestionably, some new duties and responsibilities created in the case of all collectors, and it is evidently contemplated that others may arise. To give, therefore, a confined (not to say a technical) meaning to the term "depositories," which should exempt some of them from the corresponding obligation in regard to their bonds, would be as great a deviation from the spirit and intention of the law, as I have endeavored to show it would be from the fair interpretation of its language. The fact, that at places where there is an office of receiver general or treasurer of the mint, but few of the functions of a depository will or ought to be discharged by the collector of the customs, may be true; but this does not, in my opinion, conflict with the view of the law which I have taken, or authorize the conclusion that it was not intended to make them liable to perform such functions, any more than the same circumstance would exempt them entirely from being even required to perform the duties of fiscal agents.

I observed, in the communication to you on this subject before referred to, that where the present security is sufficient, and seems to be reasonable and safe, in the opinion of the proper officer of the department, a new bond for the same amount, but suitable in its terms to meet the new and increased duties, may be substituted for the existing one, and need not be in addition thereto. I now further observe, that, should it be deemed, on the other hand, more expedient, and likely to occasion less hardship to those collectors who have given security in a very large sum for the faithful performance of their present duties, an additional bond may be taken, in the new and suitable terms referred to by the act, in an amount sufficient to meet merely their new responsibilities, leaving the existing bond to cover their original duties. The authority given by the act, to increase the amount and strengthen the obligation by fresh securities, at any time when the Secretary

Liability of Assistant Quartermaster as Drawee, &c.

of the Treasury shall deem it to be advisable, places in his hands ample power to protect the public interests whenever the regulations or directions of the departments shall impose upon these collectors any of the fiscal agencies or other functions not now practically exercised, for which the act provides.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

LIABILITY OF ASSISTANT QUARTERMASTER AS DRAWEE AND GARNISHEE.

Where an assistant quartermaster gave a draft on another assistant quartermaster to A, who sold it to B, who surrendered it for an authority to draw on the maker for the amount, and afterwards drawing therefor by making a bill and selling it to C, who caused it to be presented to the drawer of the first draft, who had been served with papers at the suit of A, as garnishee—DECIDED, that the drawee should disregard A's process, and that he pay the draft which he had authorized to be drawn upon him.

ATTORNEY GENERAL'S OFFICE,

December 8, 1840.

SIR: I had the honor to receive your letter of the 24th November, relative to the claim of Doctor John Baldwin for the amount of a draft held by him on Assistant Quartermaster Plummer, and inquiring whether the department is authorized to direct its payment.

It appears from the papers submitted to me, that a considerable sum of money was due to Arthur McGill, by Assistant Quartermaster Plummer, at Cedar Keys; that, not having funds there to pay the amount, he gave McGill a draft on Assistant Quartermaster Clarke at New Orleans, which was received by McGill in payment; that the latter subsequently sold this draft to James P. Worth, who called on Assistant Quartermaster Plummer, the maker of the draft, and, as he was about to proceed to New Orleans, offered to surrender the same on receiving in lieu thereof an authority to draw on him (Plummer) for the amount. This arrangement the latter states he gladly made, and gave him a written power to that effect. On the arrival of Worth at New Orleans, he negotiated a bill on Assistant Quartermaster Plummer, with Doctor John Bald-

 Right of Purchaser of the Amistad to a Register.

win, exhibiting the above written power as his authority; the same having been previously submitted by Doctor Baldwin to Assistant Quartermaster Clarke, who declared it to be genuine. The *bona fide* purchase of the bill by Doctor Baldwin for its full consideration is admitted. It was presented to Assistant Quartermaster Plummer, and he declined payment for want of funds. He says, in terms, "Had I been in funds when the bill of exchange was first presented, it would have been promptly paid." After all these occurrences had taken place, Arthur McGill, it appears, instituted a suit at Cedar Keys against Worth, in which an attachment was issued against the funds of the latter in the hands of Assistant Quartermaster Plummer, and he was summoned as garnishee. Upon this proceeding he refused to pay the bill of exchange held by Doctor Baldwin, and still refuses.

I am of opinion, in this state of facts, that the attachment did not operate on the funds in his (Assistant Quartermaster Plummer's) hands, upon which the bill was drawn; and that the same ought to have been, and now should be, paid to Doctor Baldwin.

Should you communicate this opinion to Assistant Quartermaster Plummer, it will be proper to guard against the inference that, by so doing, the department considers the United States in any way concerned in the transaction, or answerable for any damages arising or accruing to either party.

H. D. GILPIN.

To the SECRETARY OF WAR.

 RIGHT OF PURCHASER OF THE AMISTAD TO A REGISTER.

The Spanish schooner Amistad having been condemned (not for any breach of the laws of the United States,) and sold by order of the district court of the United States for the State of Connecticut, and the purchaser having applied for a register—DECIDED, that he is not entitled to a register, but that documents showing the order of sale, its execution by the proper officer of the United States, and the purchase and title of the present owner, ought to be issued to him.

ATTORNEY GENERAL'S OFFICE,

December 14, 1840.

SIR: I had the honor to receive your letter of the 8th instaut, enclosing several documents from the Comptroller of the Treas-

Right of Purchaser of the *Amistad* to a Register.

ury, and inquiring whether, under the provisions of the second section of the act of 31st December, 1792, a register and other papers can be granted to the purchaser of the Spanish schooner *Amistad*, which was, it is stated, lately sold under a decree of the district court of the United States in Connecticut.

As there is no transcript of the decree or sentence of the court, of the order and terms of sale, or of the marshal's return, nor any report of them from that officer, or the district attorney, among the papers sent me, I am unable to ascertain what were the grounds of the decree against the vessel, and the nature of the sentence. It appears, however, to be certain that she was not "adjudged to be forfeited for a breach of the laws of the United States," and that an appeal from the decree against her by the district court, for whatever cause it was given, is yet pending and undecided. "An appeal," say the Supreme Court, in the case of *Yeaton vs. the United States*, (5 Cranch, 280,) "supersedes the sentence altogether; it is not *res adjudicata* till the final sentence of the appellate court; it is lawful to allege what was not before alleged, and to prove what was not before proved."

The second section of the act of the 31st December, 1792, prescribes the only cases in which a vessel may be registered; they are, where she is built in the United States, and belongs wholly to a citizen or citizens thereof; where she was not built within the United States, but belonged on the 16th May, 1789, and has since continued to belong, to such citizen or citizens; where she was captured in war by such citizen or citizens, and has been condemned as a prize; and where she has been *adjudged* to be *forfeited* for a *breach of the laws* of the United States, being wholly owned by such citizen or citizens. In the last case, the purchaser who applies for a register is required by the fourth section of the same act to produce a copy of the *sentence* of forfeiture. The act declares that in no other case shall a vessel be entitled to registry. Of course, a register, and such papers as can be given only to vessels having the qualifications and requisites for registry, cannot be issued to the purchasers of the *Amistad*. This, too, appears to have been the uniform practical construction of the act by the Treasury Department, in similar cases—at least since 1812. Such other

Patents for Pre-emptions where there are Conflicting Assignees.

documents as show the order of sale, its execution by the proper officer of the United States, and the purchase and title of the present owner, ought to be issued to him.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

PATENTS FOR PRE-EMPTIONS WHERE THERE ARE CONFLICTING ASSIGNEES.

Where an assignee in blank of the floating right of pre-emption to a specific quantity of land is in conflict with an assignee of the same right which has been actually located, and the Commissioner of the General Land Office is satisfied that the assignment in blank is not clearly fraudulent, he ought to issue the patent to the original pre-emptor, leaving the conflicting claims to be settled by courts of justice.

ATTORNEY GENERAL'S OFFICE,
December 18, 1840.

SIR: I had the honor to receive your letter of the 10th instant, enclosing certain papers from the Commissioner of the General Land Office, relative to the conflicting claims of Mr. G. W. Watterston and Messrs. Millaudon and Hodge, to patents as assignees of the floating rights of certain pre-emptors under the act of 19th June, 1834; and inquiring whether the same can be issued in cases where the assignment was made by the pre-emptor in blank, and before the actual location of his floating right.

From the papers sent me, it appears that Messrs. Millaudon and Hodge claim these patents on the ground that the lands were purchased by them *bona fide*, and for a valuable consideration, from a pre emptor having a vested right of entry under the provisions of the second section of the act of 29th May, 1830, as revived by the act above mentioned; but that the actual location under this right not having been made at the time of sale, the assignment was in blank as to the description of the land and the names of the assignees, though complete in other respects, and accompanied with the duplicate receipt of the payment of the purchase-money to the United States. Mr. Watterston, on the other hand, claims these patents on the ground that the lands were purchased by him subsequent

Collectors' Bonds under Act of July 4, 1840.

to their location under the floating rights, and by a complete assignment; and he alleges not merely that the assignment to Messrs. Millaudon and Hodge is imperfect, and conveys no title, but that it is tinctured with fraud.

I am of opinion that, in such a case, if the Commissioner of the General Land Office is satisfied that the assignment to the first assignee is not clearly fraudulent, the patent should be issued in the name of the pre-emptor, and that the General Land Office should not pass upon the conflicting claims of the assignees. It cannot be doubted that where a pre-emptor has an ascertained and vested right of entry, he may pass an interest to a *bona fide* purchaser, which a court of equity would recognise; and yet, for the General Land Office to assume the power of determining how far such an interest is to prevail against an assignee holding a title complete in form, would be to exercise an authority which appropriately belongs to, and can be much better performed by, the judicial tribunals. By issuing the patent in the name of the pre-emptor, and by giving timely previous notice thereof to all parties known to be interested, an opportunity will be afforded to them to test the superiority of their respective claims before a court of justice. Not only did they know, at the time of purchase, that they became possessed of an imperfect title, (there being no patent issued,) but that they would be subject, in an examination of the conflicting matters of fact and law by the General Land Office, (should it decide them,) to the same trouble and delay that would attend one made in a court of justice, without the advantages incident to the latter.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

COLLECTORS' BONDS UNDER ACT OF JULY 4, 1840.

Collectors of customs are required to execute new bonds embracing the new duties imposed on them by the act of 4th July, 1840.

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Collectors' Bonds under Act of July 4, 1840.

The act requires all collectors of customs to safely keep, without loaning or using, all the public money collected by them, or otherwise at any time placed in their possession or custody, till the same is ordered by the proper department to be transferred or paid out, except as therein particularly provided; and although he is required to pay it over, the character of his responsibilities and his duties is changed, even though there be no increase of money on his hands.

ATTORNEY GENERAL'S OFFICE,
January 7, 1841.

SIR: As requested, I have read the argument of Mr. Hoyt, enclosed in his letter of the 29th of December, 1840, which you handed to me, against the right of the Secretary of the Treasury to require from him a new and suitable bond under the act of 4th of July, 1840.

I consider it able and ingenious; but I cannot assent to many of its conclusions, especially on the main question at issue. After the full opinion given to you on the 7th of December last, I have not thought it necessary to analyze and sift it with the care which the importance of the subject would otherwise require, and which, at a period of more leisure, I would willingly bestow. I shall, therefore, now only briefly advert to a few points which most forcibly occur to me at the moment.

The first position of the collector calls for no commentary.

In his second position, "that they [the persons from whom new and suitable bonds are required] were depositaries officially existing, and under bond, before the act," I cannot concur; for before the act, there were no such depositaries recognised by any law whatever. The last depositaries known to any act of Congress, prior to the act of 4th of July, 1840, were the local banks; and it is very clear that the independent treasury act did not refer to them. This position of the collector is of itself an error, and consequently the argument based upon it is invalid from beginning to end.

The third position, (that they are depositaries who may have accumulations of money in their hands, consistently with the act of July 4, 1840,) is in one sense correct; that is, if we understand the accumulation to mean any money received, or required to be received, under the law of 1840, by the officer. But, taken in that sense, it does not exclude the collector at New York. The sixth section provides for such accumulations

of public money; it declares that all collectors of customs (a phrase which is broad enough to include the collector of New York) "be, and they are hereby, required to keep safely, without loaning or using, all the public money collected by them or otherwise, at any time placed in their possession or custody, till the same is ordered by the proper department to be transferred or paid out," except as is thereafter particularly provided. The particular exception so provided for, and applicable to the collector at New York, will be found in the ninth section of the act. It is, that he shall pay over to the receiver general at New York, under the directions of the Secretary of the Treasury, as often as once a week, the money in his hands. That is all. Consequently, between the last order of transfer, and the one next to follow it, there must be an accumulation to which the subsequent order of transfer relates. So far, there is an accumulation of money in his hands, by the ordinary and usual operation of law. But, suppose a case of vacancy in the office of receiver-general at New York for several weeks, occasioned by death or otherwise—a contingency which must often happen: may not money then accumulate still more in the hands of a collector, and could not the Secretary of the Treasury use it while there? Could not the Treasurer draw directly upon it? In such a contingency, it appears to me the collector at New York is, under the act, and ought to be, charged with the safekeeping, transfer, and disbursement of the money collected by him; or, at all events, that he may be so charged—which, legally speaking, is the same thing. If this is not so, how is the seventeenth section to be made applicable to him? If this is not so, how can he be punished criminally, as provided by that section, if he should convert, invest, or loan all the revenue collected at New York? That section applies, in terms, only to officers who are thus charged; and being so charged, they become depositaries of the moneys accumulating in their hands, in the manner to which I have adverted.

The sixth section is that which defines the officers who become depositaries; it fixes the nature of, and the title to, the money while in their hands; it changes that which they receive, absolutely and specifically, into public money, in contradistinction to the condition in which it was formerly held by

 Compensation to District Attorneys for Extra Services.

them before it was brought into the treasury by warrant; it makes the whole of it (with the exception of such as is by law to be deducted from the accruing revenue) public money, from the moment it is collected from the citizen, until the moment it is paid back to some other citizen in satisfaction of his demand upon the government. The whole character of the obligation or responsibility of every collector (even though he be not required actually to perform new duties) is, in my opinion, changed by this law from what it formerly was. He holds the public money now, in a different capacity from that in which it was held before; even though there be no increase whatever of the amount in his hands.

Nor can I subscribe to the force of the reasoning by which it is attempted to show that the collector of New York is not a "depository," and yet is "an officer charged by this act with the safekeeping, transfer, and disbursement of public moneys," and, as such, liable to the penal provisions of the seventeenth section. To decide that he is not the former, seems to me to carry with it the conclusion that he is not the latter; and as I should consider it a great omission to exempt him from the penalties to which the collector is subjected, I should certainly think (as you have suggested) that, if any doubt exists, it would be expedient to remove it by a declaratory legislative provision, to be introduced among those you propose to ask from Congress. I may go farther, and say, that the doubt having been started and supported with much plausibility, it will perhaps be best to do so.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

 COMPENSATION TO DISTRICT ATTORNEYS FOR EXTRA SERVICES.

The district attorney of Vermont is entitled to an allowance for expenses incurred in numerous journeys, undertaken, with the approbation of the Solicitor of the Treasury, for the purpose of securing certain payments due to the United States, and a further allowance for compensation in superintending the sale of certain real estate in Vermont.

ATTORNEY GENERAL'S OFFICE,

January 21, 1841.

SIR: I had the honor to receive your letter of the 6th instant, enclosing an account of Daniel Kellogg, United States attorney

Refunding Duties paid under Protest.

for the district of Vermont, and a letter from him of the 5th instant, explanatory thereof; and inquiring whether the items fall within the exception stated in my opinion of the 17th April, 1840.

The items of this account appear to be—1st. Certain expenses, amounting to \$218, incurred in numerous journeys (undertaken, as is stated, with the approbation of the Solicitor of the Treasury) between October, 1834, and June, 1838, for the purpose of securing sundry payments from the administrators of Robert Temple, who was charged with certain frauds against the United States. 2d. A balance of an account for services performed by direction of the Solicitor of the Treasury in 1834, in selling certain real estate, and amounting to \$8 25. 3d. A claim of \$100, for compensation and expenses in September, 1840, in attending a trial in one of the State courts, by direction of the Solicitor of the Treasury.

I am of opinion that the first and second items ought to be allowed, if sanctioned by the head of the executive department to whose supervision the particular cases belong. If the third item is (as I presume it is) for “expenses in a suit in which the United States are concerned,” it ought also, when so sanctioned, to be allowed, on the principle stated in my letter of the 5th December, 1840.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

REFUNDING DUTIES PAID UNDER PROTEST.

Duties erroneously paid under protest, and accounted for by the collector, cannot be refunded by the Treasury Department without previous legislative sanction.

ATTORNEY GENERAL'S OFFICE,

January 22, 1841.

SIR: I had the honor to receive your letter of the 9th November, 1840, relative to certain duties alleged to have been paid under protest, by A. H. Denckla and Co., at New York, in January, 1838; and inquiring whether the duties, if erroneously exacted and paid under the protest, can be refunded after the death or change of the collector who received them.

 Discharge of Imprisoned Debtors.

In reply, I have to state that, in my opinion, the death or change of the collector makes no difference in the authority to *refund* duties improperly received, if they were accounted for by him to the United States, or to his successor, as a part of the current revenue. In the case where the collector who received them never accounted for them to the United States or to his successor, they cannot, of course, be *refunded*. If the party who paid them has any equitable right to look to the United States, it is one that cannot be admitted or acted upon by the Treasury Department, without legislative sanction and approbation.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

 DISCHARGE OF IMPRISONED DEBTORS.

Where imprisoned debtors are discharged on payment of costs, it is to be inferred that the condition embraced only the costs of suit in the cases in which they were imprisoned.

The expenses of the examination may be paid from the judiciary fund.

ATTORNEY GENERAL'S OFFICE,

January 22, 1841.

SIR: I had the honor to receive your letter of the 8th September, relative to the terms of the discharge from imprisonment granted by you to Jacob Knight, after an examination made pursuant to the provisions of the act of 6th June, 1798, and inquiring whether the condition that he should be "discharged on payment of costs" will now authorize any proceedings against him to recover the expenses of that examination—he having paid only the taxed costs of suit previous to his discharge.

In reply, I have to state that, in my opinion, the condition can only be regarded as applying to the "costs of suit" accruing in the case or cases in which he was imprisoned. That is a well defined phrase, and does not embrace such expenses as those to which you refer.

I consider the expenses of an examination as coming within the terms of the appropriation "for defraying the *expenses* of

 Location of Grants to the Sons of Benito Vasquez.

suits in which the United States are concerned;" and that, as the payment of them by the party was not made a condition of his discharge, they may be paid out of that appropriation.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

 LOCATION OF GRANTS TO THE SONS OF BENITO VASQUEZ.

The confirmatory act of 2d December, 1833, gave to the sons of Benito Vasquez an absolute claim to lands; but the same was a floating right, and cannot be located on any of the public land of the United States, until further legislation shall be had in the premises.

The omission in the act to make suitable provision for the location was doubtless accidental, yet it can be rectified only by Congress.

ATTORNEY GENERAL'S OFFICE,

February 5, 1841.

SIR: I received from my predecessor your letter of the 25th of November, 1839, relative to the confirmation and location of certain claims of the sons of Benito Vasquez to lands in the State of Missouri, under the act of 4th of July, 1836. I have postponed an opinion heretofore, from the desire of the different parties in interest to submit their views on some of the questions involved.

It appears by the documents before me that on the 16th of February, 1800, the sons of Benito Vasquez applied to the lieutenant governor of Upper Louisiana for a grant, in consideration of the services of their father, of eight hundred arpens of land, in superficies, to each of them, which they wished "to take in one or several places of the vacant land of the King's domain." On the 17th February, 1800, the lieutenant governor "grants to the said petitioners the land which they solicit, if it is not prejudicial to any person;" and the public surveyor is directed to put the interested parties in possession of the quantity of land asked for, in one or two vacant places of the royal domain; after which, he is to draw a plat, and "deliver it to the interested parties, to serve them in obtaining the concession and title in form." No location or survey under this grant appears to have been made, nor was any title in form issued to the interested parties previous to the cession of Lou-

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isiana to the United States. When the board of commissioners was appointed, under the act of 2d March, 1805, for the purpose of ascertaining and adjusting titles and claims to land within the ceded territory, this claim was presented for confirmation, but it was refused by that board. It was again presented to the board appointed under the act of 9th July, 1832, and was by them formally confirmed on the 2d December, 1833. "The board," say they, "are unanimously of opinion that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, or their legal representatives, according to the concession." The transcript of this decision was transmitted by the board to the Commissioner of the General Land Office, and by him laid before Congress.

By the first section of an act passed on the 4th July, 1836, this decision made by the board of commissioners was confirmed, saving and reserving only to adverse claimants (if there were any) the right to assert the validity of their claims in a court of justice. This confirmatory act embraced the decisions in regard to various claims under Spanish grants, which were favorably reported upon by these commissioners; and the second and third sections provided that where any tract or tracts so confirmed, or a part of them, had been previously located by other persons under a law of the United States, the confirmee was not to have a title to such particular tract thus previously located, but that he might locate such interfering tract or portion of his claim "on any unappropriated land of the United States which was subject to entry at private sale, and lay within the State of Missouri or Territory of Arkansas, in whichever the original claim might be." The locations so authorized were to be entered at the proper land office; and the register was to give to the claimant a certificate of location, on which a patent was to be issued by the Commissioner of the General Land Office.

It appears that, since the passage of this act, the interest of Joseph Vasquez, one of the grantees above referred to, has become vested in J. Epes Cowan, who took possession under it of a tract of eight hundred arpens in the State of Missouri, then unsurveyed, but since surveyed, and found to embrace

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the whole of section 36 in township 29, range 4 west of the 5th principal meridian, and a part of the southeast quarter of section 25 in the same township and range. Since the survey of the land, he has applied to the Commissioner of the General Land Office for such instructions to the officers of the land district within which the land in question lies, as may enable him to obtain a certificate of location, and a patent, pursuant to the third section of the act of Congress above referred to.

I am of opinion that the first section of the act in question fully confirms, and gives a valid title under the grant, to the sons of Benito Vasquez; but I do not think that, without further legislation, the same can be located upon any of the public lands of the United States. This can never be done except by authority from the legislature; and the law in question, though it confirms the grant, does not provide for its location. The first section is certainly nothing more than confirmatory of certain Spanish claims. It is in the second and third sections that the power to locate them is given, if anywhere. What is that power? It is to locate "tracts" confirmed by the first section, and tracts "lying within the State of Missouri or the Territory of Arkansas." If such confirmed "tracts" interfere with lands already surveyed and sold by the United States, provision is made for their location elsewhere. It seems to me impossible to regard these provisions as applicable to any grants but such as have already had a specific location; they cannot be applied to floating and unascertained claims—mere rights of location, such as the grant to the sons of Benito Vasquez is, even though they are valid and confirmed. All the claims confirmed by the first section, except a very few, were located Spanish grants: for them, the second and third sections of the act adequately provide; for the others, no provision is made—doubtless, from accident; but the omission is one that can only be rectified by the legislature.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Right of Peter H. Hobart to a Patent for Land on Bayou Sara.

RIGHT OF PETER H. HOBART TO A PATENT FOR LAND ON
BAYOU SARA.

The right of Peter H. Hobart, who derived title from John McDonald, to a tract of land on Bayou Sara, in Alabama, was confirmed by the act of 2d March, 1829, to the extent of twelve hundred and eighty acres.

The provisions of the act entitling a conferee to a patent are positive; and it ought to be issued for the tract as located, unless it shall be made satisfactorily to appear that the bayou, which is the chief landmark, does not exist at the place described.

ATTORNEY GENERAL'S OFFICE,
February 23, 1841.

SIR: I had the honor to receive your letter of the 1st January, 1841, enclosing certain papers from the Commissioner of the General Land Office, relative to the claim of Peter H. Hobart, in right of John McDonald to a certain tract of land on Bayou Sara, in the land district of St. Stephen's, Alabama; and inquiring whether the same was confirmed under the act of 2d March, 1829; and, if so, whether the present location can be legally recognised, and a patent issue therefor.

It appears from the papers submitted to me, that John McDonald, on the 1st June, 1798, petitioned the governor general of Louisiana for a grant of "a tract of pine land containing forty arpens front on each side of the creek called Sara, beginning immediately above the lake formed by the said creek, and running up the same forty arpens, and extending back on each side of the said creek twenty arpens." On the 19th July, 1798, Governor Gayoso de Lemos directed the commandant of Mobile to establish the petitioner upon the tract of land so solicited, in the place described. It is alleged that the petitioner took possession under this permission, but no survey or title in form is produced. The claim was presented to, and rejected by, the board of commissioners appointed under the acts of 25th April, 1812, and of 3d March, 1819. On the passage of the act of 3d March, 1827, allowing claimants to lands in the district within which this tract was situated, whose claims had been presented and acted upon by the previous commissioners, but additional evidence in regard to which might be adduced, to present their titles and claims anew to the register and receiver of the land office at St. Stephen's, Al-

Right of Peter H. Hobart to a Patent for Land on Bayou Sara.

abama, this claim was presented, received, and examined. In their report, dated 29th February, 1828, (abstract A, No. 1,) the claim was recommended for confirmation to the extent of twelve hundred and eighty acres. On the 27th March, 1828, this report was transmitted to Congress, and by the act of 2d March, 1829, the claim thus reported upon was "confirmed to the extent therein recommended for confirmation," so far as to be a relinquishment on the part of the United States of any claim whatever to the tract so confirmed. The register and receiver of the same land office were, by the act, invested with power to direct the manner in which the claim should be located and surveyed, having regard to the laws, usages, and customs of the Spanish government on that subject, and also to the mode adopted by the government of the United States; and it was directed that certificates of confirmation and patents *shall* be granted for all lands confirmed by the provisions of the act.

On the 22d September, 1831, a survey appears to have been made by James Dowell, a deputy surveyor of the United States, under the authority of the surveyor of the United States for that district, but not under the authority of the act of 2d March, 1829. In this survey the twelve hundred and eighty acres of land were located according to the present claim; and it appears that at that time a mill and other valuable improvements, erected as early as 1819 or 1820 by Peter H. Hobart, who derived his title under McDonald, were existing thereon. This survey was duly returned to, examined, and approved by, the principal surveyor of the district. Subsequently to this survey, but at what exact date I do not find, the property was purchased for a considerable sum of money by Robert Williamson, and passed into his possession. On the 10th September, 1836, the register and receiver issued an order, under the authority of the confirmatory act, for the survey of the tract in question; and on the 3d November, 1836, the survey was made by Andrew Henshaw, the deputy surveyor of the United States, locating the land so as to embrace nearly if not all the same location, and having the same eastern boundary as the survey of James Dowell. Before a certificate was issued, a protest was filed with the register at St. Stephen's, by several persons who had

Right of Peter H. Hobart to a Patent for Land on Bayou Sara.

located pre-emption claims upon the tract in question; which claims, however, did not profess to be founded upon any Spanish grant, or any claim conflicting with that of John McDonald. In July, 1837, the tract was surveyed at the instance of Robert Williamson, by Dean Knox, a surveyor, who discovered the marks of, and ran the same lines as Dowell. Since that time voluminous evidence has been taken on two points—the possession and cultivation of McDonald, and the correctness of the location. Testimony is offered on both sides, and conflicts in some particulars.

I am of opinion, after a full examination, that there is evidence of early cultivation and settlement, and that there is presumptive evidence of the same having been made by John McDonald; but, independent of that fact, I regard the report of the register and receiver on the 29th February, 1828, as to the validity of the claim, and its distinct confirmation by Congress in the following year, as conclusive. I consider the title valid, to the extent of twelve hundred and eighty acres.

In regard to the location there is more doubt, for the evidence is more contradictory. There are, however, in reality, but two points to be ascertained. The first is, whether there is a lake or pond formed by Bayou Sara, at the place where the present eastern boundary of the tract crosses that creek. Dowell speaks of a faint recollection of his having seen, in 1831, when he made his survey, a small lake or pond where the line passed. Knox speaks of its existence positively, when he made his survey in 1837. John Forsyth, jr., describes it distinctly as existing in 1840, at the place where the line crosses the creek—though it is, as he says, so far from the road passing in the neighborhood, and so much hidden from sight by the woods, as not to be readily observed. On the other hand, several witnesses, who speak of being familiar with the country, deny its existence altogether. If called upon to form an opinion from the testimony before me, I should say that the point in question is sufficiently ascertained, and that the eastern boundary of the tract is properly located; but the existence of such a natural landmark as the pond referred to is a matter of fact so easily proved, that, if doubt is entertained, steps should be taken to remove it. The second point is as to the correctness

Compensation to Clerks for Extra Services.

of the location with relation to the creek itself. The grant calls for an equal quantity on each side of the creek; and the present survey embraces a larger quantity on the southwest side than on the northeast side. It is to be remembered, however, that the original grant was for sixteen hundred French arpens; but that, owing to the limitation imposed by the 2d section of the act of 3d March, 1819, the register and receiver, while they confirmed the claim, were obliged to diminish the amount of land to the quantity thereby prescribed. As there is nothing, either in the letter or the spirit of the law, which would make it improper to deduct the part thus taken from the amount of the original grant, entirely on the northeast side of the creek, I am of opinion that, in this respect, there is no objection to the location.

The provisions of the act entitling a conferee to a patent are positive; and it ought, in my opinion, to be issued for the tract as located, unless it shall be made satisfactorily to appear that the pond or lake, which is the chief landmark, does not exist at the place described.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

COMPENSATION TO CLERKS FOR EXTRA SERVICES.

Clerks in the office of the Secretary of War are not entitled to extra compensation for attending to the business connected with the reservations under the Creek treaty of March 24, 1832.

The contingent fund cannot be properly applied in payment for extra services.

ATTORNEY GENERAL'S OFFICE,

February 27, 1841.

SIR: I had the honor to receive your letter of the 6th January, 1841, enclosing a communication from the Commissioner of Indian Affairs, relative to extra services of Mr. Charles E. Mix, a clerk in his office, who was directed to attend to the business connected with the reservations under the Creek treaty of 24th March, 1832; and inquiring whether an allowance can be made to him therefor, out of the contingent fund of the Office of Indian Affairs.

Respecting the Pardoning Power.

Though the services of Mr. Mix appear to have been important and arduous, yet, as they were assigned to him in the exercise of his duties as a clerk in the office which appropriately had charge of them, such an allowance as that proposed could not be regarded in any other light than an increase of his salary for the discharge of official duties. I am aware of no authority so to apply the contingent fund. The proper mode of obtaining compensation appears to me to be an application to the legislature.

H. D. GILPIN.

To the SECRETARY OF WAR.

RESPECTING THE PARDONING POWER.

The pardoning power vested in the President extends to fines imposed upon individuals for conduct adjudged to be contempts of the circuit courts.

ATTORNEY GENERAL'S OFFICE,
February 27, 1841.

SIR: I had the honor to receive your letter of the 2d February, enclosing the application of Richard L. Dixon to the President, and the recommendation of Judge McKinley and Judge Gholson, and other persons in the State of Mississippi, for a pardon of the fine of \$400 imposed on Mr. Dixon for a contempt committed by an affray between himself and another person, in the presence of the judges of the circuit court of the United States at Jackson, in that State; and inquiring whether the executive authority to pardon properly extends to such cases.

If we adopt—as the Supreme Court of the United States has decided we should do—the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President.

I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his constitutional “power to grant reprieves and pardons for offences against the

Execution of Patents for Land.

United States," there is nothing in the character of this offence which withdraws it from the general authority.

H. D. GILPIN.

To the SECRETARY OF STATE.

EXECUTION OF PATENTS FOR LAND.

It is a sufficient compliance with the provisions of the act of July 4, 1836, for the engrossing clerks to write the name of the President to patents, and for the secretary thereafter to attest them by his signature.

All the duties respecting the execution of patents, except the attestation, are ministerial, and may be performed either by the clerks or by the secretary.

ATTORNEY GENERAL'S OFFICE,

February 27, 1841.

SIR: I had the honor to receive your letter of the 24th instant, enclosing one from the Commissioner of the General Land Office, and inquiring whether the clause in the sixth section of the act of 4th July, 1836, which makes it the duty of the secretary appointed by the President, pursuant to the authority of that act, "to sign, under the direction of the President, in his name, and for him, all patents for land," is sufficiently and legally complied with by the signature of the secretary being subscribed in his own proper handwriting; the name of the President, for whom it is signed, being written by the clerk who engrosses the patent.

In reply, I have to say that, in my opinion, such a mode of execution is sufficient and legal, and is as much an execution of the patent, within the meaning of the act, as is the execution of a deed by a party who does nothing more than subscribe his name. The intention of the law was to impose on an officer appointed as the act requires the responsible duty of executing these instruments—of attesting their validity by his signature. This he has done. The rest is a merely ministerial duty, of which the form is prescribed by law; and whether it is performed by a clerk, or by the secretary himself, is quite immaterial.

H. D. GILPIN.

To the SECRETARY OF THE TREASURY.

Effect of Acceptance of Postmaster General in Payment.

RIGHT OF THE SENECA TO RETAIN POSSESSION OF THEIR LANDS.

The Seneca Indians are entitled to the possession of their hunting-grounds, as well as their cultivated lands, until the time limited by the treaty with them for their voluntary removal.

ATTORNEY GENERAL'S OFFICE,
March 2, 1841.

SIR: I had the honor to receive your letter of the 16th of December, 1840, enclosing several documents from the Commissioner of Indian Affairs relative to the purchase made by Messrs. Ogden and Fellows from the Seneca Indians, under the deed annexed to the treaty of January, 1838, and inquiring whether they are entitled to take immediate possession of the forest lands, although the Indians have not removed to their new homes, and the time allowed for their voluntary removal is unexpired.

After carefully considering the argument submitted by Messrs. Ogden and Fellows, and after examining the provisions of the treaty, I have no hesitation in expressing the opinion that the Indians are entitled to the possession of their forest lands, or hunting-grounds, as fully as to that of the improved or cultivated spots, and that there is nothing, in a correct construction of the treaty and the deed, (which must be regarded as part of it,) that authorizes us to make a distinction between the two.

The papers sent me are herewith returned.

Very respectfully, yours,

H. D. GILPIN.

Hon. J. R. POINSETT,
Secretary of War.

EFFECT OF ACCEPTANCE OF POSTMASTER GENERAL IN PAYMENT.

Where the acceptance of a Postmaster General had been given in payment of an account for work done, and the amount thereof had been recharged by a subsequent Postmaster General—**DECIDED**, that the amount of the acceptance ought not to be deducted from an account-current for other work.

ATTORNEY GENERAL'S OFFICE,
March 2, 1841.

SIR: I had the honor to receive your letter of this day, relative to the case of Blair & Rives, therein referred to, and in-

Priority of Right of United States to Payment.

quiring whether the fact of their having been recharged by Mr. Kendall, when Postmaster General, with the amount of certain acceptances of the previous Postmaster General, Mr. Barry, which were given in payment of work done for the department by order of Mr. Barry, and regularly allowed and settled by him, authorizes a deduction of that sum in the account now existing between them and the department.

It appears from the documents before me, that the case turns upon the same principle as that submitted to the Supreme Court in the suit between the United States and the Bank of the Metropolis: there an account between Mr. Reeside and the department had been settled on its journals, and similar acceptances given in payment were held by the bank. The court has this day decided that the amount could not be thus charged; and I have, therefore, no hesitation in saying, that the deductions in regard to which you inquire ought not to be made in the case of Blair & Rives.

The papers sent me are herewith returned.

Very respectfully, yours,

H. D. GILPIN.

The Hon. JOHN M. NILES,

Postmaster General.

PRIORITY OF RIGHT OF UNITED STATES TO PAYMENT.

Where a receiver of public moneys at Kalamazoo received in payment for public lands the notes of a specie-paying bank that afterwards suspended specie-payments, and then took from the bank a draft on another bank which was returned dishonored; and a receiver of assets having been appointed under the laws of Michigan, with whom the receiver of public moneys filed a claim for this debt—HELD, that, notwithstanding the acts of the latter, the legal priority of the United States to payment still exists.

ATTORNEY GENERAL'S OFFICE,

March 3, 1841.

SIR: I had the honor to receive your letter of yesterday, relative to the case of Thomas C. Sheldon, receiver of public moneys at Kalamazoo. It appears that he received \$1,500 in bank notes of a specie paying bank of the State of Michigan in payment for public lands, under general instructions from the Treasury Department, and that afterwards the bank suspended specie payments. He then took from the bank, in lieu

Date of Official Liability.

of the notes, a draft on another and solvent bank, which draft was returned dishonored. A receiver having been appointed under the laws of Michigan to receive demands against, and divide the assets of, the bank, Mr. Sheldon, without any special authority, however, from the Treasury Department, filed this claim with that receiver.

In reply to your inquiry, whether these acts of the receiver of public moneys have deprived the United States of their priority of payment out of the assets of the insolvent bank, I have to say that, in my opinion, they have not. If that priority of payment exists, as I think it does, no injury accrues to the United States from the receiver having taken the drafts in lieu of the notes.

Very respectfully, yours,

H. D. GILPIN.

The Hon. LEVI WOODBURY,
Secretary of the Treasury.

DATE OF OFFICIAL LIABILITY.

The liabilities consequent upon a reappointment to an office already held, do not commence until the term commences for which such reappointment is made.

ATTORNEY GENERAL'S OFFICE,

March 3, 1841.

SIR: I had the honor to receive your letter of the 18th of January, 1841, enclosing a communication from the office of the First Comptroller of the Treasury, in which it is stated that William Frick, the collector of the customs at Baltimore, was, on the 15th January, 1841, appointed for the term of four years from the 9th of January, 1841, he being at the time in office under a previous appointment, and inquiring when his liabilities under the last appointment commenced. I am of opinion that they commenced from the 9th of January, 1841, and not at the date of the commission. This opinion renders it unnecessary to answer the other inquiries in the Comptroller's letter.

The papers are herewith returned.

Very respectfully, yours,

H. D. GILPIN.

The Hon. LEVI WOODBURY,
Secretary of the Treasury.

OPINIONS

OF

HON. JOHN J. CRITTENDEN, OF KENTUCKY:

APPOINTED MARCH 5, 1841.

FEES OF DISTRICT ATTORNEYS, CLERKS, MARSHALS, &c.

The provision for the regulation of the fees and compensation of certain clerks, attorneys, counsellors, and marshals, in the district courts of the United States, contained in the act making appropriations for the civil and diplomatic expenses of the government for the year 1841, was designed to reduce the fees of the federal officers whose compensation by existing laws exceeds \$1,500 per year, to the scale of fees allowed by law for similar services in the highest State courts.

To give effect to this provision the several officers embraced within it should ascertain, as far as practicable, whether all the fees, emoluments, and receipts of their office, as allowed under anterior laws, will make their entire compensation exceed the sum of \$1,500 per annum; and if it be reasonably certain that they will, the officer must be confined in his charges to the rates of fees prescribed by the proviso. If they will not, or if the question be fairly doubtful, the old rule may be adhered to.

Clerks are not responsible to the treasury for fees which, after using due diligence, they have failed to collect.

ATTORNEY GENERAL'S OFFICE,

April 13, 1841.

SIR: By your note of the 1st instant, you were pleased to submit to me the letter, under date of the 29th of the last month, of Mr. O. Hoffman, attorney of the United States for the southern district of New York, presenting some questions in relation to the construction of certain provisions in the act of Congress passed the 3d day of March last, and entitled "An act making appropriations for the civil and diplomatic expenses of the government for the year eighteen hundred and forty-one." These questions, on which you desire my opinion, have reference exclusively to the proviso in that act designed to regulate the fees, &c., and to limit the compensation of certain "United States clerks, attorneys, counsel, and marshals, in the district and circuit courts of the United States," &c.

Fees of District Attorneys, Clerks, Marshals, &c.

In the enactment of this proviso, Congress evidently proceeded upon the assumption that the fees and emoluments heretofore allowed were higher, or greater in amount, than those now allowed by the laws of the several States to their respective officers performing the like services. And it is equally evident that it was the design of this proviso to reduce the fees of the federal officers to the latter and lower scale or rate in all the districts where the former scale or rate of fees would produce a compensation exceeding the sum of \$1,500 per annum. So far, the language and purpose of the act are supposed to be clear and explicit. The difficulties that have been suggested are in the practical application of the act to those instances where it may be doubtful whether the prior and higher rate or scale of fees will produce a sum or compensation exceeding \$1,500 per annum; and, in respect to these doubtful instances, the proviso furnishes no express rule for the government of its officers, and they are driven from necessity to adopt, by inference from the general tenor and purpose of the act, some rule appropriate to, and calculated to carry into effect, as nearly as may be, the intentions of Congress. Taking this view of the subject, it seems to me that it becomes the duty of each of the several officers embraced by the proviso in question, at once to ascertain, as far as practicable, whether "all the fees, emoluments, and receipts" of his office, as "allowed" under laws anterior to that enactment, will make his "entire compensation" exceed the sum of \$1,500 per annum; and if, according to that old rule of fees and allowances, it may be anticipated as reasonably certain, or certain to a common intent, that his "entire compensation" will exceed that sum, he must then be confined to and governed in his charges by the new scale or rate of fees prescribed by said proviso. On the other hand, if it be equally certain that his "entire compensation" will not exceed that sum, according to the old scale or rate of fees, he may, in that case, adhere to that old rate or scale; and so he may also, in my opinion, where it may be fairly doubtful whether or not the old and higher rate of compensation will exceed the sum of \$1,500. The officer must decide these questions under his official obligations, and should be held responsible only for a fair and honest exercise of his judgment.

In such a case, no more can be required of a public officer than due diligence in acquiring information of facts proper to guide his judgment, and good faith in the exercise of that judgment. The law in question does not make the compensation received by the officer in the past, or any preceding year, the absolute criterion by which his future fees are to be regulated. Its provisions are applied to, and intended to operate on, a certain described and present state of case; and the executive officer is left to determine, under his proper responsibility, whether that state of case exists, and to act accordingly. This may be considered as an extraordinary duty and responsibility for such an officer; but the law, it seems to me, has, in this instance, imposed it. By the words "present entire compensation," in the connexion in which they are used in the proviso, I understand is meant the "entire compensation" allowed by the present laws; and where those laws would produce to the officer a compensation, in future, exceeding \$1,500 per annum, he is required to reduce his fees to the new standard fixed by this enactment; and whether those present or previous laws would produce a larger sum than \$1,500 must be decided upon estimates made in anticipation of the results of the year, in order that the litigants, from whom the money is exacted, may have the advantage of the contemplated reduction of fees. In deciding that question, I ought, perhaps, to remark that, although other circumstances are not to be excluded, the officer ought to inquire what has been the product and amount of fees in former years, and ought to be very much guided in his judgment by the result of that inquiry.

Upon the second point of inquiry suggested in the letter of Mr. Hoffman, I have to say, that the proviso so often mentioned expressly directs, when the new rate of fees is introduced, that the officers embraced by it shall demand and receive the same fees that now are, or hereafter may be, allowed by the laws of the said States respectively, where said courts are held, to the clerks, &c., in the highest courts of the said States in which the like services are rendered. It seems to me, therefore, that if the new rate of fees is introduced in the State of New York, under the operation of this enactment; and if the "court of errors" is (and doubtless it is so) the highest court in that

Attestation and Sealing of Land Patents.

State, the clerk of the federal court in that State is entitled and authorized to charge and receive the same fees that are allowed in the "court of errors" for like services. But as for those services the like of which are not rendered in that court, his fees must be the same that are allowed for them in the highest court of the State where they are rendered. I must add, however, that it is most apparent that it was not the intention of Congress to increase the rate of fees; and that, therefore, no construction ought to be given to its late enactment which would raise the fees in any instance higher than they were at, and prior to, the time of that enactment.

Upon the third question submitted by Mr. Hoffman, I am clearly of opinion that in no event ought a clerk to be made personally responsible to the treasury for any amount of his fees which he may have failed to collect, after using, with ordinary diligence, the means of collection that are usually adopted and employed by clerks for the collection of fees for their benefit. In other, and perhaps more correct terms, the clerk ought not, in such case, to be made personally accountable, except where the loss of fees is clearly imputable to his negligence. There is much difficulty in construing satisfactorily the proviso in question, and in extracting from it practical rules for its administration. I have been compelled to attempt this task amidst the pressure of other business; but the above remarks embrace all the questions submitted, and afford whatever assistance my hasty opinions can contribute to their proper decision.

I have the honor to be, very respectfully, yours, &c.,

J. J. CRITTENDEN.

HON. THOMAS EWING,

Secretary of the Treasury.

P. S.—I return with this the letter of Mr. Hoffman.

ATTESTATION AND SEALING OF LAND PATENTS.

The countersignature of the recorder of land patents, and seal of the office thereto attached, constitute a sufficient authentication of a patent for land.

ATTORNEY GENERAL'S OFFICE,

April 10, 1841.

SIR: I have examined and considered the statements and questions propounded by the Commissioner of the General

Courts-Martial—Sentence of Lieutenant Whitney.

Land Office in his letter to you of the 8th instant, and which you have referred to me for my opinion.

The letter of the Commissioner contains a statement of the legislation of Congress, and the practice of his office in relation to the subject of his inquiries, and concludes with the following questions: "1st. Is it necessary for the recorder, after the annexation of his countersignature and the seal of the office to land patents, to again certify and affix the seal of said office to the same? 2d. If so, to what facts or statements ought he so to certify and affix the seal—that is to say, what shall be the form of the additional certificate?"

My opinion is, that, after the recorder's annexation of his countersignature and the seal of the office to land patents, it is not necessary for him again to certify and affix the seal of said office to the same. So far as his official agency is concerned, the seal of the office which he is required to affix, and his countersigning, is all that is requisite, under the law, to the validity or authenticity of patents for land. His countersigning in effect attests and certifies their due execution and authenticity, and no additional certificate from him can be necessary. My answer to the first question being in the negative, it becomes unnecessary to take any further notice of the second.

I have the honor to be, with great respect, yours, &c.,

J. J. CRITTENDEN.

Hon. THOMAS EWING,

Secretary of the Treasury.

COURTS-MARTIAL—SENTENCE OF LIEUTENANT WHITNEY.

The sentence pronounced by the court-martial in the case of Lieutenant Whitney is not illegal nor unconstitutional, but it is, under the circumstances, severe and harsh.

ATTORNEY GENERAL'S OFFICE,

June 1, 1841.

SIR: By your letter of the 13th of March last, there was referred to me the letter of Louis F. Whitney, late a lieutenant in the marine corps, &c., applying for restoration to his rank

Non-Performance of a Contract for Rations Excused.

in the said corps, together with the proceedings of the court-martial by which he was tried, convicted, and sentenced to be cashiered, for my opinion whether the objection urged by him as to their illegality and unconstitutionality is well founded.

I have examined the proceedings of the court-martial, and considered the objections of Lieutenant Whitney. However objectionable or erroneous it may be in other respects, the sentence of the court does not appear to me to conflict with that provision of the constitution which declares that excessive fines shall not be imposed, nor cruel and unusual punishment inflicted; and I am, therefore, of opinion that the objection made by Lieutenant Whitney, on the ground of the supposed unconstitutionality of the sentence, is not well founded. As to all the other objections urged by him, it is my opinion that they present questions proper for decision in the Naval Department only. Having, however, upon your reference, found it necessary to examine the whole case, I hope to be excused for saying that the sentence against Lieutenant Whitney appears to me to be severe and harsh. It is by no means clear or certain that he meditated any fraud in the little pecuniary transactions which form the basis of the charges against him, or that they might not have been fairly regarded as the thoughtless improprieties of a necessitous young man. Upon the whole, it seems to me that the milder punishment of reprimand or suspension would have fully satisfied the most rigorous demands of justice. My absence from the city has occasioned the long delay of this reply to your letter of the 13th of March last.

I am, sir, very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. GEORGE E. BADGER,

Secretary of the Navy.

NON-PERFORMANCE OF A CONTRACT FOR RATIONS EXCUSED.

Neglect of the officers and agents of government to give a contractor for rations, to be furnished the Creek Indians, due notice of an unexpected large number of them to be removed, and supplied with rations at an unseasonable period of the year, is sufficient to excuse the non-performance of the contract, and to protect the contractor from damages.

Non-Performance of a Contract for Rations Excused.

Payment for rations furnished before the contract was abandoned by the contractor, ought not to be withheld by the government on account of such non-performance.

OFFICE OF THE ATTORNEY GENERAL,

June 8, 1841.

SIR: I have had the honor to receive your letter of the 29th day of the last month, referring to me, for my opinion, a question relative to a claim asserted by the representatives of Samuel Mackay, deceased, against the United States. Your letter does not contain any statement of the facts of the case, nor does it propound any specific question, but refers for both to a communication on the subject from R. S. Coxe, esq., which was sent to me with your letter. From that communication, I learn that Samuel Mackay was a contractor with government for furnishing, during a certain period, at a stipulated price, and at stipulated places, whatever amount or number of rations might be required for the Creek Indians in the course of their removal from the west to the country assigned them on the east side of the Mississippi river; that, under this contract, he did furnish 482,848 rations, and was paid for them; that he afterwards furnished the additional number of 175,985, and then abandoned his contract, being unable to complete its performance, by furnishing the further supply of rations that was required.

On this state of the case, the government withheld payment for the 175,985 rations in consequence of, or as an indemnity for, Mackay's breach of contract; whilst he insists on payment for the rations delivered by him, and contends that his failure to complete the performance of his contract stands excused, if not justified, by the circumstances of the case, and the neglect of the officers and agents of the government to give him due notice of an unexpectedly large number of those Indians that were removed at an unseasonable time of the year. And this is the controversy and question between the government and the representatives of Mackay, which I understand to be submitted to me. I do not think it necessary to inquire or decide whether Mackay could, according to strict rules of law, have defended successfully any suit that might have been brought against him for his failure in the performance of his contract.

Payment of Lost Treasury Notes.

In such a suit he might possibly have been found guilty of a technical breach of contract, and subjected to nominal damages. But, in my opinion, the circumstances of the case, and especially the neglect to give him that notice so essential to the nature of his engagements, and to which he was entitled by the regulations of your department, are sufficient to excuse his non-performance of his contract, and to protect him, upon every just and equitable consideration, from damage for that cause. If this opinion be correct, it follows that the government ought now to pay for the rations that were actually delivered by Mackay, if that payment has been withheld on no other ground than the supposed right of the government to have damages from him for the breach of contract with which he has been charged. I desire the Secretary of War to observe, that I regard his letter as recognising the statement of facts contained in Mr. Coxe's communication; and that in all that I have here said, I have proceeded upon the assumption of its correctness without charging myself with any investigation as to facts.

I will take leave to add, that it is no part of my official duty, upon such references as the present, to investigate or search out facts, but to give my advice and opinion upon *stated* cases and questions of law.

Very respectfully, yours,

J. J. CRITTENDEN.

HON. JOHN BELL,
Secretary of War.

PAYMENT OF LOST TREASURY NOTES.

The first section of the act of 4th February, 1819, entitled "An act to authorize the payment in certain cases, on account of treasury notes which have been lost or destroyed," applies to notes issued from 1837 to 1841, inclusive.

ATTORNEY GENERAL'S OFFICE,
June 12, 1841.

SIR: I have this moment received your letter of this day, and to the question it propounds I answer that, in my opinion,

Power of Secretary of the Treasury in Certain Cases.

the first section of the act of the 4th February, 1819, entitled "An act to authorize the payment, in certain cases, on account of treasury notes which have been lost or destroyed," does apply to treasury notes issued under acts of Congress during the years 1837, '38, '39, '40, and 41, and which have been lost or destroyed; and that the owner of such lost or destroyed notes is entitled to the relief provided by that act, as though said notes had been issued prior to the passage thereof.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. T. EWING,

Secretary of the Treasury.

POWER OF SECRETARY OF THE TREASURY CONCERNING CERTAIN EAST FLORIDA CLAIMS.

The Secretary of the Treasury may examine into all the facts and circumstances which constitute the grounds upon which a judgment for losses has been rendered, and determine, upon the whole case, whether the decision of the judge is just.

The decision of the judge in such a case is not analogous to the award of an arbitrator; and if it were, the United States have not agreed to be bound by it.

The law has conferred upon the Secretary of the Treasury in such cases a jurisdiction as plenary to decide upon the whole case, as upon the judge himself.

The Secretary of the Treasury, however, has no legal power to re-commit a case to a judge for a re-adjudication.

Interest on claims for losses occasioned by troops in the service of the United States is not allowable, unless the same shall be expressly provided for in the act of Congress under which the claim is authorized to be paid.

OFFICE OF THE ATTORNEY GENERAL,

June 17, 1841.

SIR: I have received and examined the letter addressed to you by the Solicitor of the Treasury, under date of the 3d instant, with your endorsement thereon, referring to me for my advice and opinion certain points of law relating to the case or claim of Wood's administrator against the United States.

Fernando Wood as administrator of John Wood, and in right of his intestate, claims from the United States, under one of the provisions of the treaty of the 22d of February, 1819, be-

Power of Secretary of the Treasury in Certain Cases.

tween the government of the United States and Spain, satisfaction for injuries alleged to have been suffered by his intestate, in the destruction of his property by the operations of the American army in the year 1812 or 1813. In pursuance of the act of Congress of the 26th of June, 1834, entitled "An act for the relief of certain inhabitants of East Florida," that claim was examined and adjudged by the judge of the superior court of St. Augustine, who decided in favor of the claimant for a large amount—namely, for the sum of \$39,250, with interest thereon at the rate of five per cent. per annum, from the 10th of May, 1813, till paid. This decision was made on the 26th of November, 1840; and subsequently, on the 22d of December, 1840, the judge, by an endorsement on the record, then made up and prepared for the Treasury Department, stated that he was satisfied (by evidence since discovered) that a sum much too large had been allowed the claimant; and that so far as he could do it, he thereby corrected the error and reduced the sum allowed to \$24,250, with interest as aforesaid.

This brief sketch of the case is made merely for the purpose of showing the application of the two questions submitted to me, and which are as follows, to wit: 1st. How far the power vested in the Secretary of the Treasury to review the decree or award of the judge authorizes him to go in recommitting, setting aside, or modifying such award or decree? 2d. Whether the award of interest on the amount of damages (which our government has hitherto refused to pay) is rightly made; or, in other words, are the United States bound to pay interest on the damages awarded in these cases when it has been awarded? The learned and able argument that has been filed on behalf of the claimant, takes a much wider and more enlarged view than these questions present, and embraces a full discussion of the facts as well as the law of the case. The law has not intrusted or confided to me the investigation of evidence and the finding of facts in such cases. My official duty is limited to give advice and opinions on matters of law; and to this duty I shall confine myself in answering the questions you have referred to me.

The act of the 26th of June, 1834, under which this claim

Power of Secretary of the Treasury in Certain Cases.

is pursued, seems to me to answer your first question in terms so unequivocal as to leave but little room for doubt or argument. By it the Secretary of the Treasury is authorized and directed in this and like cases to pay the amount awarded by the judge, in all cases where the decisions of said judge shall be deemed by him "to be just." It is most evident that the Secretary cannot, without a full examination of the case, be prepared to determine whether or not the decisions of the judge be just; and it must therefore follow as equally evident, that it is his right and duty to make such full examination and to determine, upon the whole case of law and fact, whether the decision of the judge be just. It is inconsistent to suppose that the Secretary, who is expressly required to determine whether the decisions of the judge be just, should nevertheless be bound and controlled in his judgment by that very decision upon the justice of which he was to determine. There is nothing in the act from which it can be inferred that the decision of the judge was intended to have any technical or other effect or control over the judgment of the Secretary: on the contrary, such an interpretation would be subversive of the object and policy of the act, which in this particular was obviously to guard the treasury by requiring the free and independent concurrence of both the judge and the Secretary in favor of these claims, as the combined and only sanction that should authorize their payment. It has been urged on the part of the claimant that the decision of the judge is to be considered as an award of an arbitrator or arbitrators, and that the Secretary is precluded from all investigation in relation to it, and is bound by it, unless it be impeached on some ground of fraud or corruption in the judge. This proposition is manifestly at variance with the express purpose and intent of the act of Congress. That act requires the Secretary to determine whether the decision of the judge "be just," while the proposition contended for precludes altogether that inquiry, and turns the Secretary aside to some impeachment of the motives and conduct of the judge. It is needless to argue further to show that there is nothing in the proceedings authorized by the act of Congress—nothing in the decision, that

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can be justly regarded as assimilated or analogous to a submission to arbitration, and an award founded thereon. But if the act of Congress could be regarded as bearing any resemblance to a submission to arbitration, then it is clear from the terms of the act that the United States did not agree to be bound by the decision of a single arbitrator; and that the Secretary of the Treasury is just as much of an arbitrator as the judge of the superior court of St. Augustine, and his concurrence as essential to the making and validity of any award by them.

To proceed at once to a direct answer to your first question, my opinion is that the Secretary of the Treasury is not to act by "setting aside or modifying," in terms, the award or decree of the judge; but that the Secretary is invested with a jurisdiction as plenary to decide upon the whole case as the judge himself; and that in his revision and decision thereof, he ought to decide according to his judgment of the justice of the case, uncontrolled by the previous decision of the judge; and that the decision of the judge, in its effects, is set aside or modified just to the extent of the disagreement or concurrence therein of the Secretary. The Secretary has no authority, strictly speaking, to "recommit"—that is, to make any order for recommitting—that would be legally binding on the judge, and constrain him to open the case for new proceedings and re-judications before him. The Secretary and the judge are independent of each other in the discharge of the respective duties assigned them by the act of Congress. The Secretary can send no mandate to the judge. But still it would appear to me to be consistent with the equitable purposes of that act, for the Secretary, where, from the imperfect preparation of the case, he finds himself unable to concur in the decision of the judge, to recommend such further proceedings and examinations before the judge as the equity and justice of the case may seem to him to require. This recommendation would, no doubt, be persuasive with the judge to re-open the case, upon the application of the claimant, and in this way only can the Secretary aid a claimant in obtaining a re-investigation of his claim.

In respect to your second question, it appears to me unneces-

Power of Secretary of the Treasury in Certain Cases.

sary to go into the general question of interest, or the liability or obligation of government to pay it. In this instance, the single inquiry is not whether interest ought, in justice, or on any principle of analogy, to be allowed; but whether the judge has been invested with any authority to award it. And this depends upon the proper construction of the act of Congress of the 26th of June, 1834. His whole and sole authority is derived from that act; it is the standard by which his jurisdiction must be measured and limited. What is it? By the terms of the act he is "authorized to receive and examine and adjudge all cases of claims for losses occasioned by the troops" in the service of the United States in 1812 and 1813. Interest on the amount of such "losses" is certainly a thing very distinguishable and different from the "losses" themselves. It may be that justice would have required in this case the allowance of interest, as well as of the principal that was lost. But Congress alone was competent to determine the extent of its obligations, and to give or withhold authority for the allowance of the principal; that is, the value of the property lost, with or without interest. The whole subject was before them for consideration and legislation; and the question of interest was as important in amount as the principal. They did legislate and provide for the liquidation and payment of claims for losses, but made no provision for any claims of interest. The inference, to my mind, is irresistible, that they did not intend to authorize the allowance of interest. It is confidently believed, that in all the numerous acts of Congress for the liquidation and settlement of claims against the government, there is no instance in which interest has ever been allowed, except only where those acts have expressly directed or authorized its allowance.

I feel myself constrained, therefore, to entertain the opinion that, so far as relates to the allowance of interest, the decision of the judge is unwarranted and erroneous.

Yours, &c.,

J. J. CRITTENDEN.

Hon. T. EWING,
Secretary of the Treasury.

The Returns of Postmasters.

TO WHOM A MEDAL MAY BE DELIVERED.

Where a medal was ordered to be struck, and, before the resolution of Congress had been executed, the individual for whom it was intended died, it was deemed proper that it should be struck and delivered to the decedent's son and administrator.

ATTORNEY GENERAL'S OFFICE,
June 22, 1841.

SIR: I have had the honor to receive your note of the 21st instant, and, in answer to the inquiry it contains, have only to state, that Morgan Neville being dead, the medal directed by the act of Congress of July 2, 1836, to be struck and delivered to him, may be legally delivered to his eldest son, who is also his administrator.

Very respectfully, yours, &c.,
J. J. CRITTENDEN.

HON. JOHN BELL,
Secretary of War.

THE RETURNS OF POSTMASTERS.

A proviso touching the duties of postmasters to make returns of emoluments received from boxes, contained in a general appropriation bill, to take effect at the commencement of a fiscal year then future, is to be considered as having effect from the date of its passage.

OFFICE OF THE ATTORNEY GENERAL,
July 11, 1841.

SIR: I have had the honor to receive your letter of the 9th instant, in which, after reciting from the act of the 3d of March last, making appropriations for the civil and diplomatic expenses of government, the proviso requiring postmasters to make returns of all emoluments received from boxes, &c., you proceed to say: "As this proviso is appended to the appropriation of \$1,050,000 for compensation of postmasters, which does not itself take effect except from the 1st of July, 1841, when our fiscal year begins, a doubt has arisen whether it should be considered as operating from the passage of the act, or only from the time at which the appropriation commences. Therefore, I

The Case of Lieutenant Drane.

respectfully ask your opinion of the construction of the law in the matter here presented."

My impression is, that the proviso in question must be considered as taking effect from the passage of the act of which it forms a part. Some doubt may be cast on the subject by the facts you have stated in the paragraph quoted from your letter, and by the peculiar phraseology of part of the proviso; but it still seems to me that these circumstances will not warrant you in postponing, by construction, the operation of the proviso, against the general rule that acts of Congress are to be understood as taking effect from their passage. There should be no departure from that rule, except in a clear case; and that exception does not appear to be sufficiently made out in this instance.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. F. GRANGER,

Postmaster General.

THE CASE OF LIEUTENANT DRANE.

A lieutenant having written a letter to the Secretary of War, which, though not intended as such, was considered a resignation by that department, and the writer accordingly dropped from the rolls, but afterwards restored by the President to his station and rank, is entitled to be paid as lieutenant during the time he was kept out of the service.

OFFICE OF THE ATTORNEY GENERAL,

July 12, 1841.

SIR: Your letter of the 30th of the last month, concerning the case of Lieutenant A. Drane, was duly received, together with the papers that accompanied it, and which are returned herewith. In the year 1835 Mr. Drane, being then a lieutenant, was struck from the rolls of the army, and put out of service by the proper authorities of the War Department. This proceeding against him was founded on a letter of his to the Secretary of War, which was interpreted into a resignation. Drane denied the interpretation of his letter, protested against his exclusion from the army, and appealed successively to Presidents Jackson and Van Buren for redress; but the deci-

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sion against him was adhered to, and he continued thus excluded from the service, till President Tyler, lately, in pursuance of the finding and recommendation of a board of officers, who reported that "he was put out of service against his consent, without trial, and without having committed any military offence," ordered him "to be restored to the army, with the rank and station which he would have held, had he not been dropped from the rolls, on the happening of the first vacancy of the appropriate grade in the 5th infantry, his former regiment."

In reference to this state of case, you are pleased to desire my opinion, "Whether, on his restoration to the army, Mr. Drane will be entitled to arrearages of pay and emoluments for the period he will have been out of service, or whether he should now be paid such portion thereof as may have accrued; and if so, what is the rank to the pay and emoluments of which he will be, or is now, entitled?" The order of the President may be fairly construed as disapproving and virtually annulling the decision or act by which Mr. Drane was put out of service. Mr. Drane was a lieutenant. He has never been promoted. The order for his restoration refers to a future vacancy in some appropriate, and, as we may suppose, higher grade; but for the present it confers no new grade or rank. He must therefore be regarded still as a lieutenant; and if entitled to be paid for the period he was out of service, it can only be according to that rank. If his legal right to any such compensation was an original question, I should, perhaps, entertain great doubts about it. But the uniform usage in similar cases has been, as I understand, to allow compensation; and I am unwilling to disturb what the experience and wisdom of the past have practically settled. That usage seems to me not to be unreasonable. And I follow it the more readily in this instance, because it furnishes some measure of redress to an injured citizen. With these remarks, I proceed to a brief but more specific answer to your questions.

My opinion is that Lieutenant Drane is entitled to be paid for the period he has been kept out of service, and that he has a right to be paid all arrearages that have accrued, but that he is entitled to be paid according to the rank only that he held at

Marshals to Respect Injunctions.

the time he was put out of service. The same right and measure of compensation will of course apply to all future time that may elapse before his actual restoration to the army.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. JOHN BELL,
Secretary of War.

MARSHALS TO RESPECT INJUNCTIONS.

The district marshal of the United States should obey an injunction issued against him by the superior court of a Territory.

OFFICE OF THE ATTORNEY GENERAL,

July 16, 1841.

SIR: From your letter of the 13th instant, and the papers which accompanied it, it appears that under the provisions of the act of March, 1807, instructions were given, through your department, by direction of the President, for the removal of intruders from certain public lands at St. Augustine, reserved for military purposes; and that the marshal of that district, on proceeding to execute those instructions, had been served with a writ of injunction issued out of the superior court of the Territory of Florida, upon the application and complaint of individuals occupying and claiming portions of the same lands. You are pleased to request my opinion "as to what extent the marshal is legally bound to defer the execution of the orders above mentioned, while the injunction remains in force."

That court that granted this injunction had competent jurisdiction, and that alone is sufficient to entitle its process to obedience. The court may, in this instance, have erred in the exercise of its jurisdiction, but the marshal is not judge of that. While the writ of injunction remains in force, he is legally bound to obey it, and to desist from the execution of the orders above mentioned, exactly to the extent and requirement of that writ. It is scarcely necessary to add that the injunction legally restrains the marshal only to the extent which it describes and specifies; and that as to all the lands embraced

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in the President's orders and not in the injunction, it is the duty of the marshal to execute those orders.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. JOHN BELL,
Secretary of War.

CONCERNING PATENTS FOR CREEK RESERVE LANDS.

Patents for reserve lands under the Creek treaty of 1832 are to be issued to purchasers, owners, assignees, or transferees; and claimants must show themselves to be within the description of persons entitled, by exhibiting authentic evidence of the fact.

The transfer to the claimant, in this case, by the attorney-in-fact of the Columbus Land Company, unaccompanied with evidence of the title of said company, is not sufficient to authorize the issuing of a patent to him.

But a succession of assignments endorsed on the original deed, if accompanied with satisfactory proof of genuineness and fairness, is sufficient to authorize the issuing of a patent.

Transfers and assignments by agents of a land company, acting within the scope of their authority, are valid; yet, before the Commissioner of the Land Office gives effect to them, he should have satisfactory proof that such agents have acted within the compass of their authority.

OFFICE OF THE ATTORNEY GENERAL,
July 26, 1841.

SIR: You have been pleased to refer to me, for my opinion thereon, a statement of certain cases and questions enclosed to you by the Commissioner of the General Land Office in his letter of the 18th of June last. That statement is as follows, to wit: "Application has been made to the General Land Office for a patent in favor of James Abercrombie, as assignee, for the east half of section twenty-nine, township twelve, range twenty-nine—a reserve under the Creek treaty of 1832, under a deed, approved by the President, to Eli S. Shorter and John S. Scott, accompanied by a transfer to said Abercrombie, from the attorney-in-fact of the Columbus Land Company, on the ground that the said tract is the property of that company." The papers which have been submitted to show the proprietorship of said company are—*First*, a sworn abstract by A. Iverson, a member of the company, from the books of that company, of

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the Creek Indian locations which were purchased for said company by its various agents, and returned by them to said company and entered on the register of said company, and which have been sold or otherwise disposed of by said company, accompanied by his affidavit that the said company furnished the funds with which said lands were purchased, &c. *Second*, a sworn copy of the articles of agreement between the members of the company, in which it is provided that "when the purchases are, from time to time, made, the disposition of the lands shall be made by the direction of a majority," &c. *Third*, a power of attorney, from a majority of the members of the company, to A. Iverson, to make, execute, and deliver transfers or assignments of all contracts purchased by or for said Columbus Land Company, and certified to Eli S. Shorter and John S. Scott, W. N. Perry & Co., Robert S. Hardeway, agent, &c., S. Grantland & Co., and which have been sold by said company, or divided amongst the various members thereof, &c. Scott was not a member of the company. The other individuals above mentioned, viz: Eli S. Shorter, W. N. Perry, and Seaton Grantland, were members of it, according to the sworn articles of agreement; and contracts have been certified to said Robert S. Hardeway, agent of the Columbus Land Company. On the foregoing statement of facts it is submitted—

1. Whether the transfer to James Abercrombie, by the attorney-in-fact of the Columbus Land Company, is sufficient to authorize the issuing of the patent to said Abercrombie, as assignee of the said tract, appearing on the aforesaid sworn abstract.

2. Whether the transfers of the said attorney-in fact are sufficient assignments of the lands certified to W. N. Perry & Co., S. Grantland & Co., (members of the company,) and Robert S. Hardeway, agent of the Columbus Land Company, where the lands assigned are found in said abstract.

"The approved deed, with the assignment to Abercrombie, with the sworn abstract and affidavit, sworn copy of the articles of agreement, and the power of attorney to A. Iverson, are herewith transmitted."

The act of Congress which authorizes and directs the issuing of patents in such cases, provides that the President of the

HON. JOHN J. CRITTENDEN

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United States shall cause patents to be issued to such person or persons as may be the *bona fide* purchaser, owner, assignee, or transferee, of any selection or reservation which has been made to, or in behalf of, any chief or head of an Indian family, under a treaty concluded between the United States and the Creek tribe of Indians, at Washington city, on the 24th of March, 1832, whatever may be the number of intermediate transfers or assignments, provided the person or persons applying for such patent or patents shall adduce satisfactory proof to the Commissioner of the General Land Office of the fairness of said several preceding transfers or assignments. (Laws United States, vol. 9, pp. 821 and 822.) It has been said by one of my distinguished predecessors in office, that the intention of Congress in passing this act, (the one above cited,) evidently was to carry into effect contracts which had been made for reservations, which contracts had been approved by the President, and which, from lapse of time, the death and removal of parties and witnesses, had become incapable of being proved without recourse to courts of equity; and, even before these tribunals, the remedy would often be difficult and uncertain. (Mr. Grundy's opinion of the 16th March, 1839.) I cannot concur in the views of my predecessor, nor suppose it was the intention of Congress, if, indeed, it was within their competency, to confer upon executive officers a high judicial or discretionary power and jurisdiction to decide upon important interests of individuals, and to carry into effect their contracts, because those contracts had become incapable of being proved without recourse to courts of equity, or because even before these tribunals the remedy would often be difficult and uncertain. A construction of the act the very reverse of this seems to me more conformable to the principles of our institutions and to the language of the act itself. So far from giving jurisdiction to decide upon difficult and doubtful questions of contract, the act is to be regarded as addressed to executive officers, prescribing certain executive or ministerial duties, and directing the manner of their performance. Those duties involve the exercise of no more than that limited discretion that is ordinarily incident to the performance of ministerial duties. The act describes the cases in which patents are to be issued—

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namely, to purchasers, owners, assignees, or transferees—and the claimant of the patent must manifest himself to be within the one or the other of these classes, by exhibiting his deed or other appropriate written evidence of his title; and to none other but a party producing such regular written derivation of title, with proof of its genuineness and fairness, or to the heirs of such a party, can a patent be lawfully issued.

With such written evidence of title and such proof to guide, there can be but little skill or discretion required to ascertain to whom the patent should be granted. To these plain cases it was the intention of the act in question to limit the action of the Executive. If the applicant for a patent fails to make out a clear case for himself, by the production of a written legal derivation of title, and also of the required proof of its fairness, no patent right ought to be issued to him. It should be issued in his name, to whom there is such written legal derivation of title; and, if there be any person having imperfect or equitable claims to the same lands, he must be left to assert them, and seek his remedy against the patentee in the courts of justice. It is no part of the duty of the executive officers engaged in the issuing of patents to look into or decide upon such equities. They are to regard only such rights as are presented to them in the plain forms of written conveyances, assignments, or transfers. It is proper, perhaps, to add that, if those written evidences of title should, in any instance, have been lost or destroyed by accident, the party claiming by them should be permitted to supply their loss by that full proof which the rules of law require in such cases.

With these remarks, I proceed to the two questions submitted to me. To the first I answer in the negative. The transfer or assignment to Mr. Abercrombie, by the agent (Mr. Iverson) of the Columbus Land Company, is not sufficient to authorize the issuing of the patent to him, because that company does not appear to have any such title as would have authorized the issuing of a patent to them. Eli S. Shorter and John A. Scott were the original purchasers. To them the deed of conveyance is made by the Indian proprietor, and from them there is no assignment or transfer, mediately or immediately, to the said company; and without such a written

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legal derivation of title, the company itself cannot have, and, of consequence, cannot transfer to another, any right to demand a patent. It is not material what may be the mere equitable rights of parties, or how available elsewhere. These are not cognizable by the executive officers charged with the issuing of patents. Those officers can look only to such rights as are presented to them clothed in the authentic forms of written conveyance, assignment, or transfer. It follows that no assignment by the agent of that company can entitle Mr. Abercrombie to a patent for the land in question. But it seems that Abercrombie claims by another derivation of title—namely, by assignments endorsed upon the deed to the original purchasers, Shorter and Scott; the first assignment being by Shorter and Scott to Charles L. Lucas, and the second by him, Lucas, to Abercrombie. This derivation of title is sufficient to authorize the issuing of a patent to him, if accompanied with the requisite satisfactory proof of its genuineness and fairness. All that can be said as to the degree of proof on these points is, that it must be satisfactory to the Commissioner of the General Land Office. In regard to the genuineness or authenticity of the assignments, the Commissioner ought to require satisfactory testimony that they were executed and signed by all the proper parties respectively in proper person, or by some agent or attorney thereunto lawfully authorized. Where the assignments are not under seal, as in this case they are not, the authority to an agent to execute them need not be in writing. It is considered as settled by judicial decisions, (9 Vesey, 251; 5 Munroe, 188; and 4 Bibb, 296,) that to make a contract valid under the statute of frauds and perjuries, it is not necessary that the agent's authority to sell should be in writing; it may be conferred verbally. If, therefore, the assignments in this case should be made to appear to the Commissioner to be fair, and to have been duly executed by the parties themselves, or by an agent of proper authority, conferred either by writing or verbally, I am of opinion that a patent for the land should be issued to Abercrombie.

In respect to your second question, my opinion is that the transfers of the Columbus Land Company by their agent, Iverson, are not sufficient assignments of lands conveyed and cer-

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tified to S. Grantland & Co., or of the lands conveyed and certified to Robert S. Hardeway, agent of the Columbus Land Company. Neither the deeds to S. Grantland & Co., nor those to Robert S. Hardeway, agent, &c., import on their face the conveyance of any title or interest to the Columbus Land Company. By the legal construction applicable to such instruments, Grantland & Co., and Hardeway, respectively, can alone be regarded as taking any legal estate in virtue of those deeds. The equities that may, under the circumstances of the case, have resulted to the Columbus Land Company, are not here inquirable into or cognizable as furnishing any foundation for issuing to them a patent. And they have no written transfer or assignment from Grantland, from Grantland & Co., nor from Hardeway, nor have they from either of them any contract in writing recognising their right, nor any written recognition of it in any form. Therefore, and for the reasons before suggested, the Columbus Land Company do not, in my judgment, derive and exhibit such a title in these cases as under the act of Congress would authorize the issuing a patent to them; and their assignment, made by themselves or agent, cannot place their assignee in any better condition.

In regard to the remaining portion of your second question, concerning the lands originally conveyed and certified to W. N. Perry & Co., I have, with some difficulty and doubt, come to the conclusion that the Columbus Land Company do show such a right thereto, as that their assignment by themselves, or lawful agent, would authorize the issuing of a patent to their assignee. Perry himself was a member of the Columbus Land Company; and, by its articles of association, I find that it was expressly agreed and understood that the said Perry and Ingersoll do the purchasing, and the contracts in every case to be for the sole use and benefit of the undersigned, &c. When, therefore, Perry subsequently made these purchases, and took conveyances to himself & Co., it must, I think, be fairly presumed that he purchased, in pursuance of this deputation, for the sole use and benefit of the Columbus Land Company, and that this company was probably intended to be designated by the terms "& Co.," annexed to his name in the deeds taken by him. In any view of the case, it seems to me that these purchases must be regarded as made under, and subject

The Miami Canal Grant.

to, the agreement before mentioned in the articles of partnership; and that it will be doing no violence to the intention of the parties, or to the act of Congress, to consider that agreement as equivalent to an assignment to, and written recognition of, the title of said land company; and as Perry himself united in the power of attorney to Iverson, my opinion on the whole is, that the assignment of these lands by the said land company, or their authorized agent, are sufficient to authorize the issuing of patents to their assignees. It will be the duty of the Commissioner of the General Land Office to look to the sufficiency of the authority in virtue of which any agency is attempted to be exercised. In the cases that have been here treated of, the agent, Mr. Iverson, is authorized to transfer, &c., all of certain described purchases of lands "which have been sold by said company, or divided amongst the various members thereof." The authority of the agent is thus limited to purchases coming within the descriptions given, and which have also been sold by, or divided among, the members of the company; and the Commissioner, before he gives effect to the act of the agent, ought to require satisfactory proof that the act, in all respects, comes within the compass of the agent's authority.

Very respectfully, yours,

J. J. CRITTENDEN.

Hon. T. EWING,

Secretary of the Treasury.

THE MIAMI CANAL GRANT.

The Commissioner of the General Land Office properly refused to issue a patent for land entered by Governor Shannon in Ohio, and withdrawn from private entry in order to provide for executing the grant by Congress, by act of 24th May, 1828, of lands to the State of Ohio, for the purpose of aiding that State to extend the Miami canal from Dayton to Lake Erie, because it did not appear whether or not the land for which the patent was claimed was situated within the limits of the reservations, and because, if it was, the requisite notice had not been given by the register and receiver, as provided for in the regulations concerning the public lands.

OFFICE OF THE ATTORNEY GENERAL,

August 4, 1841.

SIR: By your letter of the 5th of March last, you were pleased to refer to me a communication from the Commissioner of the

The Miami Canal Grant.

General Land Office, dated the 22d of February, 1841, requesting your opinion as to the correctness of his course in refusing to issue patents for lands to Governor Shannon under the circumstances of the case stated by him. These circumstances are, briefly, as follows, to wit: On the 24th of May, 1828, there was granted by act of Congress (Laws of United States, vol. 8, p. 118) to the State of Ohio, "for the purpose of aiding said State in extending the Miami canal from Dayton to Lake Erie, by the Maumee route, a quantity of land, equal to one-half of five sections in width, on each side of said canal, between Dayton and the Maumee river, at the mouth of the Auglaise, so far as the same shall be located through the public land, and reserving each alternate section of the land unsold to the United States."

By the succeeding and second section of the same act it is provided that, so soon as the route of said canal shall be located and agreed on by said State, it shall be the duty of the governor thereof, &c., to examine and ascertain the particular lands to which the said State will be entitled under the provisions of this act, &c. In consequence of this act, and to prevent individual appropriations, it became necessary to withdraw from private sale or entry, to which it was then subject, so much of the public land as was requisite to satisfy this legislative grant to the State, and it was accordingly so done by the proper authorities. But as the route of the canal was not then located, the lands granted by the act could not be precisely ascertained; and the reservations could only be made, therefore, with a view to embrace all the lands that might be covered by this grant, whatever might be the variations of the actual line of the canal from its probable conjectural course.

After the canal was located, it was ascertained that these reservations exceeded the quantity of land granted to the State, and that part of what had been thus reserved was without the limits of the grant to Ohio, and more than five miles from the canal. And it was for this surplus portion, after it had been long withdrawn from sale and reserved, as above stated, that Governor Shannon made his entries of purchase, and now claims the patents therefor, which the Commissioner has refused to issue. The ninth regulation contained in the circular

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of the 1st of January, 1836, addressed by the Commissioner of the General Land Office to the registers and receivers of the United States land offices, is in the following words, (9th section:)

“Whenever you have reason to believe that any tract or tracts in your district, heretofore offered at public sale, may have been improperly withheld from private entry, in consequence of errors in your books, or in marking the sales upon your maps, or from any other cause whatever, you will seek information from this office in relation to such cases; and if it should then appear that the lands have been thus erroneously withheld from private entry, you are particularly required to give notice of the fact by public advertisement in the most convenient newspaper, and to be put up in suitable places, setting forth that, at a particular hour and day therein to be mentioned, you will be prepared to receive applications to enter the lands designated in such notice. This notice should be given at least thirty days before entries are to be received; and in no event will you allow any such lands to be entered or located before the expiration of the time thus prescribed.”

The opinion given by my predecessor, Mr. B. F. Butler, on the 14th of July, 1837, (Public Lands—Laws, Instructions, and Opinions, part 2d, 125,) in effect decides all that is questionable in this case. I concur with him that the regulation above cited is well warranted by the nature of the case and the general powers of the Executive under the constitution. It seems to me intrinsically proper, after public lands have been for years withdrawn by the government or its officers from the operation of the laws that subjected them to sale, that some new notice should be given when it was again intended to bring them into market. This would be consonant to the principles of that system which we have adopted for disposing of the public lands, and is required by every consideration of equality and justice. The regulation above mentioned does no more than carry this rule of propriety into effect. It is a lawful and salutary regulation, and embraces fully and all the spirit and reason of the case in question. The surplus lands above alluded to had been long withdrawn from sale. They could not properly, or consistently with the regulation aforesaid, be

Execution of a Patent Passes Title.

afterwards appropriated by entry, unless it were upon thirty days' public notice that application for entering them would be received. No such notice was ever given, nor were they ever so offered for sale; but they are now claimed solely on the ground of private entries made for them, as in ordinary cases of lands that had been previously exposed to sale at public auction. In my opinion, these entries are *illegal*, and the Commissioner acted according to law and his duty in refusing to issue patents on them. As to one of the tracts claimed by Governor Shannon, it is said to be doubtful whether it is within the limits of the land which was reserved and withheld from sale. And as to another, it is said to be within five miles of the canal, and to be one of the alternate sections reserved to the United States. As to the first of these two cases, I can only say it involves a matter of fact merely—namely, the limits of the reserved land, and whether the tract claimed lies within it. With that matter of fact I have nothing to do. It must be settled by the proper officers of the land department. And the claimant is entitled, or not, to a patent, as his claim is found to be within or without the limits of the land reserved. As to the second case, if the land claimed lies within five miles of the canal, and is one of the sections reserved to the United States, it is most clear that the claimant is not entitled to a patent.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. T. EWING,

Secretary of the Treasury.

EXECUTION OF A PATENT PASSES TITLE.

The execution of a patent for land to a soldier in the war of 1812, by the Commissioner of the General Land Office, passes the title, although the same had not been delivered to the patentee.

It is a matter of discretion with the department as to whom the patent should be delivered.

OFFICE OF ATTORNEY GENERAL,

September 7, 1841.

SIR: I had the honor to receive your letter of the 30th ultimo, referring to me, for my opinion thereon, a case stated and sub-

Execution of a Patent Passes Title.

mitted to you by the Commissioner of the General Land Office in his letter of the 29th ultimo.

The case is stated by the Commissioner as follows: "Pierre Mutell, for his services as a soldier in the late war, became entitled, under the act of Congress approved 6th May, 1812, to one hundred and sixty acres of land. He filed in this office his order of location, dated the 14th July, 1815, directing that the warrant issued by the Secretary of War in his favor might be located, and the patent for the land designated delivered to John L. Bogardus, who was authorized by him to receive the same. After the engrossment of the patent for the land in question, but before the delivery thereof, Pierre Mutell alleged before this office a fraud on the part of the said John L. Bogardus, and instructed this office to withhold the delivery of the patent until a further order from him. The patent was made out in favor of Pierre Mutell for the northwest quarter section one, in township two north, of range two west, in Illinois, dated the 29th November, 1817, and executed according to the forms of law, and has, since the date thereof, remained on the files of this office. On the 14th instant, Thomas J. Northup, esq., filed in this office his affidavit, (herewith enclosed, marked A,) setting forth that he is the owner of the land indicated in the patent above referred to, and requested that the same might be delivered to him; which was declined by this office, for the reasons stated in my letter to him of the 16th instant—believing that the title to the land embraced in the patent had not passed to Pierre Mutell, as there never had been a delivery or granting of said patent; and that any title from the patentee, either directly or indirectly, was null and void, under the express provisions of the 4th section of the act of Congress above referred to "

My opinion is, that the title to the land did pass to Pierre Mutell at the date of the patent to him, though that patent still remains in the land office without any actual tradition of it to any one. The patent was issued by authority and direction of law; and, upon general principles, where the patentee does not expressly dissent, his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and

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all such cases, the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent, and amount to an acceptance of it. The patent, in the meaning of the act referred to, is granted to the patentee from its date, though he may never actually see or receive it, and is valid and effectual to pass the title of the land.

Whether the patent of Mutell ought to be delivered to Mr. Northup upon his affidavit that he has become the owner of the land, is the only other question that arises out of the case. And as to that, I can only say that, in general, all the legal muniments of title belong to him who owns the land; and that, therefore, in great strictness, the patent ought, perhaps, to be delivered only to the patentee, or to one deriving title as purchaser under him. But as the patent is a recorded evidence of title always accessible, and as no material prejudice could result to the true owner from a stranger's getting possession of his patent, there seems to me to be no occasion for any strictness in such matters; and as the law has prescribed no measure or rule of evidence on the subject, it seems to be left, very properly, as a matter of discretion with the department. Mr. Northup's affidavit is certainly no legal evidence that he is the owner of the land; but it may be very sufficient for the incidental purpose of obtaining possession of the patent, and ought, I think, to be so regarded, unless there be other circumstances to excite distrust or suspicion of fraud. The Commissioner must act on his discretion in delivering patents out of his office. To require of every patentee who should apply for his patent strict proof of his identity, or of every purchaser from or under him, a regular exhibition of his derivation of title, would be a great grievance; while, on the other side, it would be very improper to hand out patents promiscuously to any and every applicant that might choose officially to ask for them. In the due exercise of the duties of his office, the Commissioner must endeavor to avoid both extremes; and his official discretion must be his guide.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. T. EWING,

Secretary of the Treasury.

OPINIONS

OF

HON. HUGH S. LEGARE, OF SOUTH CAROLINA:

APPOINTED SEPTEMBER 13, 1841.

REMOVAL OF THE CHEROKEES.

The questions whether the matter is not to be regarded as *res judicate*, and whether the departure of the Indians to the west was a condition of payment, discussed.

OFFICE OF THE ATTORNEY GENERAL,

September 26, 1841.

SIR: This case is submitted to me for an opinion upon it after decisions against the petitioner of two successive Secretaries of War, conformably to the opinion of one of my predecessors and that of the Commissioner of Indian Affairs and Mr. Comptroller Paris.

The judgment of the late Secretary, Mr. Bell, is very positive and peremptory. His reasons appear to me to be weighty, as his authority in all things connected with the Indian Department is entitled to particular respect, from his long experience at the head of the Committee on Indian Affairs in the House of Representatives. Were this *res integra*, I should have felt some difficulty whether, under all the circumstances of the Cherokee emigration, the departure of all the Indians, or at least their removal to the west of the Mississippi, was really meant to be treated as a condition *sine qua non* of their receiving the commutation in question. But in so doubtful a point I cannot undertake to advise the department to change a course concurred in by so many able and experienced men, especially as, according to Mr. Bell's observation, the matter having already been considered by one house of Congress and acted on there, ought properly to be regarded as *res judicata* before the Executive.

Maximum of Compensation, &c., of Collectors.

I ought to add, perhaps, that I do not attach any importance to the assignment and its supposed effects. It was a mere account; so not a negotiable paper. The holder took it subject to all equities, one of which is refusal of payment for failure of consideration, on the principle of *causa data causa non secuta*; so that it brings us back to the inquiry, was the departure to the west, of the Indians in question, a condition of payment, according to the opinions hitherto expressed by the War Department?

HUGH S. LEGARE.

To the PRESIDENT OF THE UNITED STATES.

MAXIMUM OF COMPENSATION, &c., OF COLLECTORS.

The act of the 3d of March, 1841, making appropriations for the civil and diplomatic expenses of the government for the year 1841, was intended to restrain the incomes or annual emoluments of the officers therein mentioned as such, from all sources whatever connected with the performance of the duties of their office, to the sums therein mentioned.

Whether the allowance for agency of marine hospitals, superintendence of light-houses, and certificates for wines and teas, are fairly included within the purview of the statute, depends on the question whether these objects come within the sphere of the collector's duty, &c.

OFFICE OF THE ATTORNEY GENERAL,

September 29, 1841.

CASE.—“In the preparation of the circular and form under the 5th section of the act of the 3d of March, 1841, making appropriations for the civil and diplomatic expenses of the government for the year 1841, (Laws 2d session 26th Congress, page 32,) the question has been presented for consideration: Does this enactment apply to the maximum compensation allowed for agency of marine hospitals, superintending light-houses, and for issuing certificates of wines and teas? In the construction heretofore given by the department to previous laws limiting the compensation of collectors, naval officers, and surveyors, the maximum allowance of \$400 for superintendence of light-houses, for agency of marine hospitals, and for issuing certificates for wines and teas, has not been thought to be annulled or affected.”

OPINION.—I consider the act of 1841 as intended to restrain the incomes or annual emoluments of the officers therein men-

Claim for Reimbursement of Expenditures.

tioned as such, from all sources whatever connected with the performance of the duties of their office, to the sums there mentioned. By the previous acts, contingencies from fines, penalties or forfeitures had been omitted; and they seem to have been allowed, whatever they might amount to, to the officers in question. Under this act they are to be included in their accounts with the treasury; and in no case are they to be allowed to retain of the sums thus received, more than, added to the maximum of fees and salaries previously allowed, will make up the maximums limited by this act; *e. g.*, at New York, \$6,000. Whether the allowance for agency of marine hospitals, superintendence of light-houses, and certificates of wines and teas, are fairly included within the purview of the statute, depends on the question whether these objects come within the sphere of the collector's duty, &c., as such. If that question be answered in the affirmative, they are not to be allowed; if in the negative, they may be allowed. I see nothing in the words of this act which ought to extend the construction of it beyond that which has been put upon previous acts of a similar import. The practice of the department, as stated in the Comptroller's letter, conforms to principle, and the very letter of the eighteenth section of the act of 1822, if the services mentioned are performed in another capacity than that of collector, &c. I think it, on the whole, advisable to adhere to it until further legislation. Considered this 29th of September, 1841.

H. S. LEGARE.

HON. WALTER FORWARD,
Secretary of the Treasury.

CLAIM FOR REIMBURSEMENT OF EXPENDITURES.

The claim of Lieutenant Hunter for reimbursement of expenditures in making experiments for the propulsion of war steamers by horizontal wheels, is within the act of Congress passed at the extra session, and that for making appropriations for the naval service in 1841.

OFFICE OF THE ATTORNEY GENERAL,
October 1, 1841.

SIR: In answer to your inquiries as to Lieutenant Hunter's claim, I have to say that, comparing the act of the extra session

Claim for Reimbursement of Expenditures.

with the clause of the act making appropriations for the naval service of the year 1841, (chap. 15, acts of the session,) I think the claim comes fairly within the purview of the former. In the act of 11th September last, the appropriation is made for the purpose of making experiments to test the value of improvements in the construction of steamers, &c.; and also "for the purpose of defraying any charges left unpaid on account of experiments of the like character, heretofore made by authority of law."

I assume from the state of the case submitted to me, that the Navy Department is satisfied that the claim of Lieutenant Hunter is for charges left unpaid on account of experiments heretofore made (before 11th September last) by Lieutenant Hunter, to test the value of improvements in the construction of steamers. This being the fact, the only question as to his having a right to be paid out of the final appropriation, will depend upon the last words of the clause, "made by authority of law." Were these experiments of Lieutenant Hunter made by authority of law? No law was cited in his behalf, except the clause in the act of 3d March, 1841, already referred to. That clause is to the following effect: "For the purpose of making a satisfactory experiment of Lieutenant Hunter's invention, to propel war steamers by horizontal wheels that will be safe from the balls of an enemy, one thousand dollars." These experiments were thus clearly authorized by law; for whether the authority be direct or indirect, precedent or subsequent, can make no difference. The only restriction was in the amount appropriated, it being only one thousand dollars. But it was apparently to obviate the effects of this very restriction that the clause in the second act was adopted, and money enough allowed to cover the whole expenditures "heretofore made." Certainly the case is, on the face of the statute, not altogether free from difficulty. I understand, if evidence *aliunde* could be admitted to explain it, it could be clearly shown that the law was passed expressly with a view to this very claim, which I consider as of a highly meritorious character. But I lay no stress whatever on such evidence. My conclusion is drawn from the provisions of the two acts, read as *in pari materia*, and the evidence afforded by the vouchers. If, there-

Obligation to Surrender Fugitives from Justice.

fore, the department is of opinion that the facts of the case support a claim of compensation, according to the spirit of the act, I do not think the words present any insuperable obstacle to the payment demanded.

H. S. LEGARE.

To the SECRETARY OF THE NAVY.

OBLIGATION TO SURRENDER FUGITIVES FROM JUSTICE.

No State can, without the consent of Congress, enter into any agreement or compact, express or implied, to deliver up fugitives from justice from a foreign State who may be found within its limits.

According to the practice of the executive department, the President is not considered as authorized, in the absence of any express provision by treaty, to order the delivering up of fugitives from justice.

OFFICE OF THE ATTORNEY GENERAL,

October 11, 1841.

SIR: I find among the papers left in this office by my predecessor, a letter from his excellency Governor Seward, consulting you upon the course which ought to be pursued in the matter of one Dewit, a fugitive from justice, demanded of the governor of New York by the governor general of Canada, together with a request from yourself that it be considered by the Attorney General. I have accordingly turned my attention to the subject as soon as other pressing avocations would permit me to do so, and now have the honor to give you an opinion upon it.

I think, from the whole argument of the bench in the case of *Holmes vs. Jennison*, 14 Peters, 540, we may consider it as law: 1st. That no State can, without the consent of Congress, enter into any agreement or compact, express or implied, to deliver up fugitives from justice from a foreign State who may be found within its limits; 2d. That, according to the practice of the executive department, as appears from the official correspondence both of Mr. Jefferson and Mr. Clay, your predecessors in office, the President is not considered as authorized, in the absence of any express provision by treaty, to order the delivering up of fugitives from justice. In the absence, therefore, of such treaty stipulations, I am of opinion that it

 Mileage of Senators at an Extra Session.

is necessary to refer the whole matter to Congress, and submit to its wisdom the propriety of passing an act to authorize such of the States as may choose to make arrangements with the government of Canada, or any other foreign State, for the mutual extradition of fugitives, to enact laws to that effect, or acts approving such laws as may already have been passed in the several States to that effect.

Whatever I might think of the power of the federal executive in the premises, were this a new question, I consider the rules laid down by Mr. Jefferson, and sanctioned after the lapse of upwards of thirty years by another administration, as too solemnly settled to be now departed from.

I have the honor to be, with distinguished consideration, your obedient servant,

H. S. LEGARE.

HON. DANIEL WEBSTER,
Secretary of State.

MILEAGE OF SENATORS AT AN EXTRA SESSION.

The sixth section of the act of 1789 provides that the compensation which shall be due to the members and officers of the Senate shall be certified by the President thereof, and the same shall be passed as public accounts and paid out of the treasury; and the certificate of the President, which is the presumed act of the Senate, is conclusive upon the matter as between that body and the accounting officers.

OFFICE OF THE ATTORNEY GENERAL,
October 18, 1841.

SIR: In answer to the questions proposed to me in regard to an item in the accounts of Mr. Dickins, the Secretary of the Senate, in which the mileage of the Hon. Mr. Senator Evans is concerned, I have the honor to submit the following opinion:

The case is: The examining clerk, to whom it was referred, has brought to my attention a special allowance made to the Hon. George Evans, of \$544 for mileage for his attendance at the special executive session, which commenced on the 4th March last. Mr. Evans was a member of the late House of Representatives; and it appears from the accounts of the pay and mileage of the members of the House, that he re-

Mileage of Senators at an Extra Session.

ceived his daily pay to the 3d of March last inclusive, as well as his mileage for coming to and returning from the session of the House ending with that day. On the next day (the 4th March) he took his seat in the Senate, and the mileage now in question is for the estimated distance from his residence in Maine, at the commencement of the special executive session of the Senate, and at the end of it. And the questions propounded are: 1st. Whether, under the facts and circumstances in the case, the member is entitled, by law, to the mileage claimed? 2d. The amount being certified by the President of the Senate, the officer appointed by law for that purpose, whether the accounting officers have a right to look behind his certificate, except in case of palpable error or mistake apparent on the face of the account?

To begin with the last—I am of opinion that the accounts, under the circumstances, must be allowed. The sixth section of the act of 1789, c. 17, (1 Story, 52,) which has been the standing rule ever since, is, that the compensation which shall be due to the members and officers of the Senate shall be certified by the President, and the same shall be passed as public accounts and paid out of the public treasury. Under this section, the certificate of the President is a sufficient warrant for payment in the case submitted to me. If a vote of the Senate had been formally taken upon it, it would have been conclusive of the matter, as between that body and the accounting officers in the executive department. But the act of 1818 gives the same effect to the certificate of the President, which is the presumed act of the Senate *pro hac vice*.

This conclusion on the second point supersedes the necessity of expressing any opinion upon the first, which, viewed as one of strict law, is not without its difficulties. I observe that one of the early Congresses doubted even whether the members were entitled to their mileage at an extra session, called, it would seem, some time after the adjournment of the first; and accordingly passed a special act to obviate all doubt. (Act 6th July, 1797, 1 Story, 483.) With a view to the mere spirit of the act, much might undoubtedly be said to show that the claim ought not to be allowed. But the Senate is the proper tribunal to decide upon this matter in the first instance, and

A Claim of Pre-emption by an Assignee.

perhaps the occurrence of this case will call the attention of that body to the subject, and lead to the declaration of some general rule for the future.

With distinguished consideration, I have the honor to be,
sir, your obedient servant,

H. S. LEGARE.

Hon. W. FORWARD,
Secretary of the Treasury.

A CLAIM OF PRE-EMPTION BY AN ASSIGNEE.

The disallowance of a pre-emption claim made by an assignee of a certificate of purchase, by the register and receiver, who had competent authority to judge of its validity, on grounds satisfactory to them that it was unfounded, is conclusive against the claim.

The acquittal of McDonald and Norton, for perjury, charged to have been committed in swearing to the affidavit upon which the claim of pre-emption was grounded, is not conclusive upon the United States in the land department.

OFFICE OF THE ATTORNEY GENERAL,
October 19, 1841.

SIR: I have had the honor to receive your note of the 14th instant, calling my attention to two communications from the Commissioner of the General Land Office, dated October 29, 1840, and February 27, 1841, and the papers which accompany the same, touching the case of Oliver D. Norton and John McDonald, referred, on the 3d of March last, to one of my predecessors.

Before I state the conclusion to which I have come in this matter, permit me to remark upon the shape in which it is submitted to me. It is a bundle of papers, containing a confused history of the proceedings in the case, without any digested statement of facts, or any precise points of law arising out of them, propounded to me for my consideration. It being no part of my duty to examine the facts of a case, I have confined myself, for the information which is the basis of my conclusions, to what I can gather from the two reports of the Commissioners, the argument of Mr. Marcy on behalf of the claim, and the letters, &c., of Mr. Curtis and others. They all, however, agree that the decision of the register and receiver was,

A Claim of Pre-emption by an Assignee.

after a deliberate examination of all the evidence, against the claim of pre-emption set up for Norton and McDonald, and that, in consequence of that decision, no patent has been issued.

The Commissioner, in his second letter, states: "Upon the *ex parte* affidavits furnished to the register and receiver by the claimants, the right of pre-emption was awarded to them; but, upon a full investigation of all the facts subsequently, after notice to both parties, such right was deemed by them invalid. The evidence on the investigation, it is conceded, is conflicting; but the district officers having passed on it, and decided it to be insufficient to sustain the claims, this office, according to its uniform practice in such cases, presuming that these officers had superior opportunities of knowing the credibility of the witnesses, does not feel itself warranted to overrule the decision on that point."

This practice of the office is not alleged to be wrong; but it is objected to the decision in the principal case—1st, that the acquittal of McDonald and Norton, indicted for the very perjury charged to have been committed in the affidavit in question, is a judicial sentence, which concludes the government, and ought to supersede the judgment of the register and receiver; 2d, that Cramer, the assignee of their certificate of purchase, being a *bona fide* purchaser for valuable consideration, without notice, is protected by the very words of the statute.

1st. As to the conclusiveness of the acquittal, I entirely concur with the Commissioner. No rule of evidence is better established than that a verdict or judgment (especially an acquittal) in a criminal case is not evidence of the fact, upon which the judgment was founded, in a civil proceeding; and this rule, for obvious reasons, would apply *a fortiori* in a case of perjury, where, to convict, requires more evidence than is deemed sufficient in any other penal prosecution. As to the idea that the United States, having ordered the prosecution, (which, it seems, they did not, except by mere construction of law,) are estopped to dispute its result, it falls, of course, with the assumed application of that result, to the case of a civil right. They are concluded, as far as *punishment* goes, for the same offence, certainly, but that is all; for the only issue they made in that record was, guilty or not guilty of a punishable offence.

A Claim of Pre-emption by an Assignee.

2d. The second ground is, in my opinion, as untenable as the first. The assignee took only an equity, and he took it, of course, subject to all prior equities. The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title. There must have been, not a *contract*, but a *conveyance*—not a *jus ad rem*, but a *jus in re*. It is scarcely necessary to cite authority for this proposition; one case out of multitudes will suffice—Boone *vs.* Chiles, 10 Pet., 177. Now the statute must be construed by the common law, if there be nothing in its peculiar wording to call for a different interpretation, and I see nothing in the act of 1838, or that of 1830, to warrant a deviation from the rule. On the contrary, read them together as *in puri materia*, and we see the distinction between the *title* and the *grant*, or *conveyance*, in the act of 1838—words clearly importing, not a *contract* executory, but the actual vesting of an estate-at-law, and the transfer of a certificate of purchase, on part payment, under the credit system. I therefore fully agree with the Commissioner in this point also.

I have hitherto discussed the subject as if the oath contemplated in the statute were intended to apply to all the proceedings necessary to the issuing of a patent; and so that the protection extended to grants or conveyances in the hands of a purchaser, in good faith, for valuable consideration, cover all such grants and conveyances, whatever they might be, made by the pretended pre-emptioner. But on reading over the act of 1838 more critically, I am inclined to think the clause in question only extends to the case of a patent actually issued to a person claiming it under oath, for his own benefit; when, in truth, he had made an agreement with some other person, that the title which he was to acquire should inure to the use or benefit of that other person. This agreement, rendered void under the acts, is here pursued into the patent itself, which in that case is made void, *except* in the hands of a *bona fide* purchaser, for valuable consideration, without notice.

Stripping the case, then, of all that relates to this oath, as not properly belonging to it, it is simply one of a pre-emption

Injunction against the Auditor of Post Office Department.

claim, disallowed by the officers, who had competent authority to judge of its validity, on grounds satisfactory to them that it was unfounded, as being set up by men whose pretended possession was not their own, in fraud of the legal possessor.

This judgment I think right; but right or wrong is not the question. The law gave them the authority to decide the case, and they have done so. The department, in my opinion, ought to acquiesce in that judgment, as in every point of view conclusive against the claim.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

The Hon. WALTER FORWARD,

Secretary of the Treasury.

INJUNCTION AGAINST THE AUDITOR OF POST OFFICE DEPARTMENT.

The circuit courts of the United States have not power to enjoin the Auditor of the Post Office Department from paying a contractor for carrying the mails, nor to enjoin the contractor from making collections from postmasters, according to his contract with the government.

OFFICE OF THE ATTORNEY GENERAL,

October 21, 1841.

SIR: I have had the honor, in compliance with the request expressed in your letter of the 24th ultimo, to consider the case presented by Mr. Whittlesey in the following statement: "William T. Stockton & Co. are the contractors for carrying the mail of the United States on four main and important routes in Georgia and Florida, at a quarterly compensation of \$6,875. The collections they make from postmasters on these routes each quarter are about \$700. William T. Stockton is the sole contractor for carrying the mail on route No. 2,461, from Tallahassee to Quincy, Florida, for which he is paid \$250 per quarter. His quarterly collections of postmasters are about \$15.

"William T. Stockton became indebted to C. F. Osborne, and, on the 29th of February, 1840, he drew two drafts on the Post Office Department in favor of said Osborne for \$6,000 each, payable out of any money then due, or which might

Injunction against Post Office Department.

prove to be due to him, individually or otherwise, for transporting the mail of the United States, or which might thereafter exist. These drafts, with another one of \$3,000, were received by my predecessor, without any agreement or obligation to pay them, and with an express notice to Mr. Rives, of the House of Representatives, then the holder, that Mr. Stockton had the right to countermand the payment whenever he thought proper to do it. On one of them a payment was made in April, and another one in May, amounting to \$3,590 87. Mr. Stockton gave notice, on the 15th of June, 1840, to C. K. Gardner not to pay the drafts, and they were subsequently withdrawn.

"After I entered upon the duties of Auditor, the two drafts of \$6,000 were presented by Mr. Coxe, (for Mr. Osborne, I understand,) and the balance due on them was demanded. I decided against making the payment from the compensation accruing to Mr. Stockton under his contracts. From this decision an appeal was taken, under the act of July 2, 1836, reorganizing the Post Office Department, to the First Comptroller of the Treasury, who affirmed the decision I made. Mr. Osborne has recently filed his bill in the circuit court of the United States for the District of Columbia against Mr. Stockton, and the court has enjoined Mr. Stockton from asking for or receiving his pay, and has enjoined me, as Auditor, from paying Mr. Stockton, or any one else by his authority, until the further order of the said court shall be had in the premises. It has long been the practice of the department to collect from postmasters by the person who contracts to carry the mail on the route on which their offices are situated; and the money so received applies in part payment of the contractor, who stipulates to perform this service in his contract. It is a question whether the injunction extends to such collections."

It thus appears that an attempt is made by means of an injunction, issuing out of the circuit court of this District, to compel the government, through its executive officers, to account with a master in chancery for whatever balance, on the auditing of his accounts, may be found at any time due to a contractor or other employé of the government; and *vice versa*, to attach in the hands of the government whatever may at any

Injunction against Post Office Department.

time, on striking a balance, be due to such employé or contractor.

It is easy to perceive that such a practice fully carried out would lead to the settling of most accounts of the government by judicial instead of executive officers, on principles laid down by the courts in analogy to their proceedings in private causes, and, perhaps, wholly incompatible with all correct and expeditious administration of public affairs. There remains but one more step to be taken: it is for the court to appoint a *receiver* in such cases, who shall oust the executive officers, and assume all their responsibilities under the control of the courts, and not that of the executive department; indeed, that step is virtually taken here.

The manner in which this interference would operate, and the extent to which it would embarrass all the business of the country, may be conceived from one circumstance brought to view in the passage of the Auditor's letter to you extracted above. It appears that a part of the arrangement with the contractors is, to empower them to receive payment from the deputy postmasters of the dues of the latter to the government, and, with funds thus received by authority of the government, to satisfy *pro tanto* their own claims upon the department. This plan, it seems, is, in all respects, most convenient and effective for the purposes proposed. But this injunction interposes; the defendant (Stockton) is enjoined from receiving, as agent of the government, (though should there be a balance in his favor for his own benefit,) the arrears due by deputy postmasters to the department; and to ascertain the state of this balance, of course an account must be stated, which is to be settled by the officers of the court.

Were this a new question in this office I should feel it my duty, after the many attempts recently made to subject the whole administration of the government to the superintendence of a local tribunal, to go somewhat at large into the merits of it; but I am fortunately saved that trouble by one of my distinguished predecessors, who, many years ago, gave an opinion upon this very subject, which I adopt in its whole extent, and to which I respectfully refer the department for its government

Enlistment of Aliens.

on this occasion. I allude to Mr. Wirt's opinion, recorded in this office as of the 27th of July, 1824, in the case of James L. Cathcart. (Opinions of Attorneys General, vol. i, p. 681.) Since that opinion was written, several cases have been decided touching the responsibility of executive officers to the courts; but there is nothing in any of them to encourage any attempt to turn the government compulsorily into a garnishee or stakeholder for all its innumerable officers and employés, and to transfer the auditing of its endless accounts to the master in chancery. The *United States vs. Kendall* goes no further than a strictly ministerial act, commanded by an express act of Congress. *Decatur vs. Paulding* shows that the Supreme Court is fully aware of the dangerous consequences that would attend the slightest extension of the principle of that case. The case of the Bank of the Metropolis was a set off under a negotiable instrument accepted without reserve or qualification. Here, not only was there no acceptance of a negotiable paper, but a distinct and proclaimed refusal to accept according to a very salutary rule adopted by the department; and the very object of this suit is to substitute the decree of a court for the will of the executive officer, and to set up an acceptance by construction of law, in a case in which it was refused in fact. In short, it is a suit against the United States; and Mr. Whittlesey, the auditor, is no more responsible than any other officer under the chief executive authority of the country.

I recommend, therefore, that there be no acknowledgment, direct or indirect, of the jurisdiction of the court. The course pursued by Mr. Secretary Paulding may serve as a precedent, or any other which the district attorney shall prefer.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

To the PRESIDENT.

ENLISTMENT OF ALIENS.

Until the passage of an act by Congress authorizing the enlistment of aliens into the military service of the United States, such enlistments must be regarded invalid.

Enlistment of Aliens.

Whether the State courts have jurisdiction in any case involving the validity of an enlistment discussed; and a reference to the federal tribunals recommended in all matters, with a view to the avoiding of unpleasant and dangerous conflicts of doctrine and jurisdiction.

OFFICE OF THE ATTORNEY GENERAL,
October 22, 1841.

SIR: I have had the honor to receive your note of the 16th instant, submitting for my consideration the following questions: "1. Is the enlistment of an alien valid? 2. Have the State courts jurisdiction in any case involving the validity of an enlistment?"

1. Nothing can be clearer than that the voluntary enlistment of aliens is agreeable to the law of nations, which makes a part of the common law; and it is not without difficulty that I have been brought to think that the acts of Congress, fairly construed, have deprived the Executive of a resource apparently so necessary to our military establishment, and, one should think, so peculiarly appropriate in a country always full of young men intending to become its citizens as soon as possible, and willing to be its defenders in the mean time. But, if the policy of the act of 1815 be considered, as an act passed immediately after a war, in which a totally different course had been pursued, (for, in all the acts for increasing the army *flagrante bello*, any sort of able-bodied white man was allowed to be enlisted,*) it will be difficult to put any other interpretation

* See an act to raise an additional military force, January 11, 1812.

An act supplementary to an act for the more perfect organization of the army of the United States, January 20, 1813.

An act in addition to the act entitled "An act to raise an additional military force," January 29, 1813.

An act to amend the act in addition, entitled "An act to raise an additional force, and for other purposes," July 5, 1813.

An act making further provision for filling the ranks of the regular army, encouraging enlistments, and authorizing the re-enlistment for longer periods of men whose terms of service are about to expire, January 27, 1814. See also acts of January 28, 1814, and February 10, 1814.

An act making further provision for filling the ranks of the army of the United States, December 10, 1814.

NOTE.—Jefferson wished an amendment adopted to the constitution, that all officers and soldiers, not natives of the United States, shall be incapable of serving in their armies by land except during a foreign war. (Jefferson's Works, vol. 3, p. 26.)

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on it than that Congress meant its regular army in time of peace to consist only of citizens. This act revives in this particular the act of 1802. Now, the eleventh section of that statute not only directs affirmatively, and rewards the enlisting of effective able-bodied citizens of the United States, &c., but by one of its provisos it as expressly forbids the enlisting of men of any other description: "And if any officer shall enlist any person contrary to the true intent and meaning of this act, for every such offence he shall forfeit and pay," &c. Even without this negative clause it would have been difficult to maintain, consistently with the statutes, the common law right of enlisting foreigners; for the power to raise armies belongs to Congress, and, by exerting it, might well be thought to have exhausted its power. But, in the face of such a prohibition, all doubt seems to me to be at an end.

The law standing thus, under the acts of 1802 and 1815 read together, does the act of 1821, subsequently passed, for reducing and fixing the military peace establishment, make any changes in it? I answer that it does not. Its object is simply reduction, and the changes incident to reduction. In all other respects it must be interpreted as making part of a system of which the fundamental principles were settled by those more comprehensive enactments. If the conclusion I have come to is fully supported by the usual rules of construction up to this point, it certainly derives great additional force from the consideration already thrown out, viz: that during all the exigencies of war, the condition of citizenship was entirely dispensed with.

It is plain that Congress supposed different principles to apply to the state of peace, from those which govern nations in time of danger; and as soon as the danger was passed, they abolished the institutions it had justified. It deserves to be added that Blackstone, whose Commentaries have always been an elementary book with our legislators, is of opinion that the soldiers of the regular army ought always to be natural-born subjects. Whatever we may think of the justness of this opinion, it shows at least that it might be entertained by enlightened men. On the whole, I see no remedy for the evils anticipated from this construction, but in an act of Congress authorizing such enlistments.

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 Power of President to Fill Vacancies.

2d. As to the second question, it would in my opinion be a very strong proposition to advance, that a man imprisoned against law, under a color of authority from the government of the United States, should be deprived of the protection of the State courts, by means of the great and speedy remedy of the *habeas corpus* act, where there is no means of resorting to the federal tribunals. I do not say the jurisdiction of the State courts is free from doubt. I should not have said so *a priori*; and much less inclined am I to affirm it, after what fell from Chancellor Kent in the matter of Ferguson, (9 John. 239,) and especially after the grave caveat entered upon the subject by Mr. Justice Story, in the case of the United States *vs.* Bainbridge, (1 Mason, 71.) But this I will venture to say—that it is far more agreeable to the analogy of our institutions, and exceedingly desirable, with a view to the avoiding of unpleasant and even dangerous conflicts of doctrine and jurisdiction, that the State courts should in all doubtful matters refer the complaint to the federal tribunals, which are always at hand, and fully able to give the relief sought, according to principles established by the common consent of all the States, for the government of all.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

To the Hon. JOHN C. SPENCER,
Secretary of War.

POWER OF PRESIDENT TO FILL VACANCIES.

The constitution authorizes the President to fill vacancies that may happen during the recess of the Senate, even though the vacancy shall occur after a session of the Senate shall have intervened.

The Executive power of *removal* from office, as indicated in the argument of Mr. Madison, delivered in the first Congress, drawn from the character of Executive power and Executive responsibility, and from the irresistible necessity of the case, has been acquiesced in by the whole country.

OFFICE OF THE ATTORNEY GENERAL,

October 22, 1841.

SIR: I have had the honor to receive your communication of the 21st instant, asking for my opinion whether that clause

Power of President to Fill Vacancies.

of the constitution of the United States (article 2, section 2, clause 3) giving the President power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session, authorizes him to fill a vacancy so occurring after a session of the Senate shall have intervened.

It would have been much more satisfactory to me to have given an opinion upon a particular case stated, than one in the form of an abstract proposition. Neither are the words in which the point is submitted to me entirely free from all ambiguity. For the purpose, therefore, of obviating every possible misunderstanding, I have the honor to state, that I assume the case proposed to be as follows, viz: that a vacancy having occurred during a recess, the President had filled it up by a temporary appointment, under the clause of the constitution in question; then, after the meeting of the Senate, had made another nomination, which was not acted upon by the Senate; and so the office being now vacant, the question is, has the President power to fill up again, by granting a commission which shall expire at the end of the next session of the Senate? This question, however difficult it may appear to have been rendered by opinions thrown out, or proceedings had in analogous cases, does seem to me, with all possible deference for the superior wisdom of others, to admit of no doubt, whether it be considered as one of pure legal science, or as matter of public expediency.

In the first place, then, it seems to me that the vacancy strictly "happens" during the recess. By the supposition, an appointment has been made to hold during the whole session. There is a complete plenarity up to its expiration. It is not until after the very last act of that body, or its adjournment has been consummated, that the office becomes vacant in contemplation of law. But, if so, then it has happened during a vacancy. I say it has "happened;" for, if any stress is laid on the peculiar use of that word, as implying something fortuitous and unexpected, the presumption must be that the omission to confirm the nomination was a mere oversight. If the office is one created by law, the law which requires it to be filled is as binding on the Senate as on the President, whose

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special duty it is to see it executed. I suppose this to be a case of the kind. The Senate, then, has no discretion to fill or not to fill it, but only to see to its being properly filled. But, if it has taken no order upon the President's nomination—if it has left a chasm *quo ad hoc* in the power of executing the law, and that, too, contrary to the commands of the law itself—the respect which the law acknowledges and challenges from that august body, would require us to presume that the omission was a mere accidental one. At all events, it would be a rare and unexpected occurrence; and it would be no abuse of the term to say it happened, as I have shown it would have happened, during a *recess*. It is needless to say this reasoning does not apply to a case in which the creation of the office itself might depend upon the concurrence of the Senate: for instance, the still unsettled question, whether a President (Mr. Madison in 1813) may send an extraordinary embassy abroad during a recess.

2d. The *argumentum ab inconvenienti* is at least as strong as the preceding view of the question, as one of strict law. The President is charged with the whole executive power, so far as it has a positive, substantial existence. He is to see the laws, and all the laws, executed. He is to fill all offices with fit persons, with a view to execute the laws. It is clear no interruption, no *interregnum* of executive power, can be contemplated. As long as the law lives, it must act; as long as it speaks, it must be heard; as long as it commands, its precepts must be enforced. Therefore the President, charged with the high duty of giving full effect to the law, must have a power like its own existence—perpetual. The people, however, were wisely jealous of this great power of appointing the agents of the executive department, and chose to restrain its discretion by requiring it in all cases to *nominate*; but only in case it had the concurrence of the Senate, to appoint. But as it might be easily foreseen, that to allow the execution of the law to depend altogether upon the discussions or movements of a deliberative assembly would bring with it all the evils of a plural Executive, and lead to perpetual interruptions of the whole course of public affairs, and even to most dangerous *interregna* in the executive powers essential to the order and de-

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fence of society, the convention very wisely provided against the possibility of such evils by enabling and requiring the President to keep full every office of the government during a recess of the Senate, when his advisers could not be consulted: not only so, but, making allowance for the tardiness and uncertainties inseparable from the debates and proceedings of all deliberative bodies, they extended this indispensable authority to the very last moment of the session. My opinion is, that the same overruling necessity which applied to the original vacancy applies to the second one, created by an omission of the Senate to act on a nomination.

That body has only a negative and secondary agency in appointment to office. It has no share of the executive power, properly so called—that is, active, discretionary executive power; it simply controls the head of that department in the choice of its agents. It has no constitutional right to create an interregnum of the government; no such tremendous discretion has been confided to it. It is not responsible to the people for any failure to execute the laws. It cannot be impeached for denying the means of executing them to him who is liable to be judged and punished for a failure to exercise the powers which, in every well-constituted society, must be perpetually and everywhere at work for its protection. In short, I repeat, I can see no reason to doubt about the question in any aspect of it.

If any authority were needed to enforce considerations which seem so obvious and conclusive in themselves, I think the celebrated debate on the power of removal in the first Congress would furnish it. The whole country seems to have acquiesced in the argument of Mr. Madison, in favor of that power drawn from the character of executive power and responsibility, and from the irresistible necessity of the case.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

HON. JOHN C. SPENCER,
Secretary of War.

Claims under Treaty Ceding Florida.

CLAIMS UNDER TREATY CEDING FLORIDA.

By the last clause of ninth article of the treaty of 1819, with Spain, and the acts of 23d March, 1823, and 26th June, 1834, the Secretary of the Treasury is required to pay the claims for injuries caused by the military operations of 1812 and 1813, on which a favorable report may have been made by the judge of the superior court of St. Augustine, where, upon examination of the decision and the evidence on which it is founded, he shall deem the same to be just. In these cases the examination of the judge is to enlighten the mind of the Secretary, as the verdict of a jury in a feigned issue is to enlighten the conscience of the chancellor; and his decision is simply *arbitrium boni viri*, and not conclusive, in any degree, upon the Secretary. He must, nevertheless, look into the whole matter, and ascertain for himself whether the government is liable, and to what extent.

If the case be one of injury by the military operations referred to, in which no ordinary care of the proprietor or his agents, and no ordinary goodness of the property supposed to have been injured, would have guarantied it against the alleged injuries, it is within the treaty, and the claimant is entitled to his damages.

In respect to the damages, the Secretary ought to be satisfied that the consequences which are alleged to have ensued upon the trespasses in question, were no more than what, in the ordinary course of things, would be expected to be caused by them; that is, that after they occurred, there was no *laches* on the part of the owner in his efforts to repair them, and that the evils, whatever they were, were not aggravated by some defect peculiar to the character and condition of his property.

OFFICE OF THE ATTORNEY GENERAL,

October 25, 1841.

SIR: I have considered the claim of Bunch's executor, and have now the honor to submit, according to the request contained in your letter of the 21st instant, my views as to the principles which ought to govern the department in deciding on the awards under the last clause of the 9th article of the treaty of 1819, with Spain, taken in connexion with the authority vested in the department by acts of Congress of 23d March, 1823, and 26th June, 1834, to satisfy those awards.

It is the plain meaning of the two acts, that the Secretary of the Treasury is to pay the claims on which a favorable report may have been made by the judge of the superior court of St. Augustine, only in cases where, upon an examination by the department of such decision, as well as of the evidence on which it is founded, that decision shall be deemed by the Secretary of the Treasury to be just. In other words, Congress meant to bind itself by the reference to judicial examination,

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only so far as the head of the Treasury Department should be satisfied with its results. The examination of the judge is to enlighten the mind of the Secretary, just as the verdict of a jury in a feigned issue is to enlighten the conscience of a chancellor; and in both cases with precisely the same freedom on the part of him whose decree is to be final, to follow, after all, his own sense of what belongs to the real equity of the case. The only doubt that can possibly arise under the words of the acts is, whether, the award of the judge being considered as unjust, or not "deemed just," by the Secretary, the latter be at liberty to do any thing more than simply refuse to pay it. But it is more agreeable to the indulgent spirit in which treaties are construed to consider the greater as including the lesser authority, and the department as warranted, in all cases wherein its objection is only to the amount of the allowance, to diminish that amount, and satisfy the claim accordingly; taking care, however, that a receipt in full or release of all further demands be executed by the claimant. In short, the sentence of the judge below is not intended to be *res judicata* as between the government and the claimant, with the usual effect of a complete estoppel between parties, but it is simply the *arbitrium boni viri*, binding only so far as it is agreeable to reason and equity.

The department, in its examinations of the decisions below, will look to two distinct points, both of them, in matters of consequential damage, of equal importance and difficulty: 1st. Is the government liable at all? 2d. To what extent is it liable? The words of the treaty are quite general—indeed, excessively so; but they are significant enough, perhaps, to admit of a satisfactory practical application to the case now in question. "The United States will cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida." The act of 1834 ascertains, in point of time, the operations referred to, (1812;) but the character and circumstances of the injury necessary to bring a case within the treaty, to make out what is called a *casus fœderis*, are more difficult of precise adjudication. There is no subject

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that has been treated in a more refined and comprehensive spirit by the great masters of the civil law than that of consequential damages, as you will be satisfied by simply turning to one of them, to whom I respectfully refer you for your guidance in this matter—I mean Domat, (vol. 1, p. 407, s. 99, b. 3, tit. 5, sections 1, 2, 3.) See especially a case precisely in point, p. 415. The principles there developed are of universal application in all cultivated jurisprudence.

The first question that presents itself is, Were the injuries complained of suffered by the claimants by reason of the operations of the American army? Here an important suggestion must be made—that which prevades the whole body of the law—*causa proxima, et non remota, spectatur*. Thus it is by no means sufficient to show that, had the American army never entered Florida, the events complained of had not happened; for no one can justly be held responsible for any damages that are not the obvious, natural, and immediate consequences of what he has done or omitted to do. Mere accidental coincidences, and distant contingencies, are never taken into account in the filiation of legal cause and effect. The injury done must have been such as everybody might have anticipated from the trespass or omission. It is not enough that the latter be the occasion of it, merely; it must be its cause properly so called. Suppose, for instance, it can be shown that an ordinarily well-disciplined family of negroes would not have been driven from their work by the presence or the proceedings of the troops in question; and, consequently, that if the master had the authority which is usually implied in that relation, his slaves would have made and gathered a crop; I have no hesitation in saying the law would have allowed no damages at all, though it could be proved that, in fact, the slaves in question, being very little under control, or very particularly timid or ignorant, fled or became unmanageable at the appearance of an invading force. If, on the contrary, it be proved that they were driven away by force, or actual threats of bodily or other evil, such as a licentious soldiery usually inflict, the case would be very different. I put the matter thus in the abstract, because, of course, I have not looked into the facts on which the decision of the judge is bottomed. I am only stating, in com-

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pliance with your request, the legal principles applicable to such questions.

The first thing, then, is to be sure that the case is one of injury caused by the military operations of 1812 and 1813, in which no ordinary care of the proprietor or his agents, and no ordinary goodness of the property supposed to have been injured, would have guarantied it against the alleged injuries. If you be satisfied on this head, then the case comes within the treaty, and the only remaining inquiry will be as to the extent of the damages, and, consequently, of the reparation to be made for them. Here, too, the department must bear in mind that it ought to be satisfied that the consequences which are alleged to have ensued upon the trespasses in question were no more than what, in the ordinary course of things, would be expected to be caused by them; that is, that, after they occurred, there was no *laches* in the owner, in his efforts to repair them; and that the evils, whatever they were, were not aggravated by some defect peculiar to the character and condition of his property. If you should be satisfied on this head, then the next inquiry that arises in the case, as I perceive from the papers before me, is, whether you can make allowance for prospective as well as present or actual damage; and, if that be answered affirmatively, by what standard they are to be measured. I have no doubt at all that prospective or consequential damages are as much within the treaty as actual injuries; but they must come within the rule which I have had the honor to lay down under a former head. They must have been *caused*, not simply occasioned, by the military operations in question; and they must not have been aggravated by *laches*, &c. In short, they must, in every fair and equitable sense of the word, have been necessary consequences.

There can be no difficulty about a crop actually made and ready to be gathered; there is, in principle, none as to the liability of any one by whose trespass or default it is proved that the making of a crop has been prevented. It is clear, he must make reparation as far as the extent of the injury can be ascertained. That he should be exonerated from the responsibility by reason of any uncertainty as to the measure of the wrong he has inflicted, were to allow him to take advantage

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of his own delinquency. If it be uncertain what the crop would have been, who is to blame for that uncertainty but the invader that prevented its actually being made? Still, it is admitted that the application for redress is embarrassed by the difficulty of making it out with the precision necessary to all legal retribution. Take the analogous case put by Domat (*ubi sup.*, p. 415) of a lease for several years which is interrupted from the first or second year. The estimate would depend upon various calculations of chances: upon the probability of such events, on the one hand, as hail, frosts, barrenness, a fall in the price of produce, &c., &c.; on the other, of plentiful crops, high prices, and a ready market; in a word, it might very well be that the farmer would neither lose nor gain by the eviction. Yet, inasmuch as farmers usually make their bargains with a view to profits, and landlords lease their farms under that expectation, the uncertainty of such events is no reason why the loss which the farmer must in all cases be supposed to have suffered, and in most cases would in fact suffer, should not be repaired. But all that human reason can do, and what justice is required to do, under such circumstances, is to take a medium of the profits which the farmer of such lands may usually make, adding the considerations called for by the special circumstances of the case, such as whether his contract had hitherto been very profitable, or otherwise; whether or not he might easily have got another farm; whether he had many years of his lease to come or not,—since greater or less damages might fairly be awarded according to the state of the case in those particulars; for it is a principle applicable to all the cases within the category in question, that a good deal is allowed to the prudence of the judge in mitigating the damages. In the uncertainty of events, as the great authority referred to has it, it would not be just that the reparation of damages should be equal to the gain which one might hope for from a success altogether favorable.

These being the principles, the practical question will probably be disposed of without much difficulty by the department, enlightened as it is, no doubt, by many precedents and analogies within its own experience, and by the information fur-

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nished through its local agents. You will permit me merely to suggest a single consideration: A crop of agricultural produce represents, in strict theory—1st, the rent of land; 2d, the wages of labor; 3d, the profit of stock. In this country, especially in Florida, rents are merely nominal; they may be almost thrown out of the case; and, as the work of tillage is altogether done by slaves, the wages of labor are generally confounded with the profits of capital. Still, all these elements enter into a case like this. It does often happen, for instance, that slaves are hired for the purposes of agriculture. In that case, it is very clear that the capitalist who employs them expects that over and above what is necessary to reimburse him the wages of his laborers, he shall have what is reckoned in those countries a fair profit on his investment. This is more than the interest of money. Planting is always a troublesome and hazardous, and, in sickly countries, and such as are exposed to Indian depredations and other the like disorders, even a dangerous employment. No man would undertake such a business, under such circumstances, if he were to receive no more than what one year with another would be considered as only the fair average wages of slave laborers hired out, to be fed, taken care of, and managed by others. I therefore am of the opinion, should you think, on all the principles which I have endeavored to state and develop, that the wages of slaves were fairly due on the ground of crops destroyed, or prevented from being made, that this last consideration would warrant you in going somewhat beyond mere wages; how far, is a grave matter on which your discretion will be worthily exercised. Regretting that the haste in which parties require me to pass upon their claims exposes me to the risk of doing less justice to such subjects as you have submitted to me than their importance demands at my hands,

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

The Hon. WALTER FORWARD,
Secretary of the Treasury.

Aid to Distressed Seamen.

AID TO DISTRESSED SEAMEN.

Seamen on board vessels of war are not entitled to pecuniary assistance from consuls abroad, under the act of 28th February, 1803.

The moneys in the hands of the Secretary of State were raised from the wages of merchant seamen only, and should be applied only for the relief of that class of seamen which have contributed to the fund.

OFFICE OF THE ATTORNEY GENERAL,

October 27, 1841.

SIR: In compliance with the request contained in your note of the 25th instant, that I would give you my opinion on the construction of the 4th section of the act of Congress of February 28, 1803, in reference to the rendering pecuniary assistance by the consuls abroad to distressed seamen left at their consulates by United States vessels of war, I have the honor to state that, after a conversation with the Fifth Auditor as to the practice of the department, and on collating carefully all the acts having reference to the subject in question, I have been convinced, notwithstanding a strong first impression to the contrary, that the fund in the hand of the Secretary of State is appropriated to providing for destitute merchant seamen only.

The act of 1803 must be read with the act of 1792, to which it is merely supplementary, and with the act of 1814, (chap. 161, 2 Story, 1432.) The result is, that the fund which your department is authorized to dispose of is charged with a special trust, as it is raised in a special way—by deductions out of the wages of merchant seamen. The public service is subjected to rules of its own; and the administration of it, throughout all its interests, is committed to the Secretary of the Navy. The words of the 4th section of the act of 1803 are, it is true, very general and comprehensive, but they must be interpreted according to the subject-matter; and *that* limits and qualifies them as above.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

FLETCHER WEBSTER, Esq.,

Acting Secretary of State.

Power of Postmaster General to Remit Fines.

POWER OF POSTMASTER GENERAL TO REMIT FINES.

The Postmaster General ought not to meddle with any case of forfeiture finally disposed of on deliberate examination by his predecessors.

The principle of *res judicata* must be adopted, as a general rule, for the executive departments.

The Postmaster General is vested with a discretion concerning forfeitures not passed upon.

As to cases of delinquency reported to Congress, the mere fact of a report having been made ought not to bar any really substantial and equitable excuse which a contractor might have to make.

OFFICE OF THE ATTORNEY GENERAL,

October 28, 1841.

SIR: In answer to the questions submitted to me in your letter of the 26th instant, I have the honor to give the following, as my opinion on the true meaning of the act of 1836 in the particulars designated by you.

1st. I am clear that you ought by no means to meddle with any case of forfeiture finally disposed of, on deliberate examination of the circumstances, by any of your predecessors. The principle of *res judicata* must be adopted, as a general rule, for the executive departments, or great inconvenience, besides infinite loss of time, would ensue.

2d. As to cases of delinquency reported indeed to Congress, but in which no application has ever been made to the Postmaster General for a remission of the forfeiture, (or fine, as it is called,) I feel some difficulty. However, on reflection, it seems to me the better opinion that the mere fact of a report having been made ought not to bar any really substantial and equitable excuse which a contractor might have to make. The Postmaster General is required to report at a certain day; the delinquency may have occurred just before, and must be taken *prima facie* to be a good cause of forfeiture; yet the contractor might be able to show, if time were allowed him for collecting and transmitting his evidence, that it was altogether excusable. It would be very arbitrary to rule that his excuse, however sufficient, should be precluded by the misfortune which prevented his making it in time. No statute ought to be construed so as to work injustice, or, which is the same thing, inequality before the law.

Aid to Distressed Seamen.

I think that Congress, in passing the act of 1836, had two distinct objects in view, both of which are entirely consistent with this view of its meaning: 1st. To control the administration of that very important department of the public business, by subjecting it to a vigilant inspection in all its operations. 2d. To be enabled, by probable estimates, to regulate its own appropriations for the future. Now if, in reports made, it is understood that of the fines and forfeitures recorded, some are to be enforced, that others have been remitted, and that a third class are still open to examination, for a reasonable time, every good purpose of the act may just as well be accomplished as by adopting the strict, and, I think, unequal and unfair rule just referred to. I say open for a *reasonable* time, for, of course, no *laches* must be suffered in such cases; and if the excuses were too much delayed, they ought, for that reason alone, to be rejected. This high discretion seems to have been acknowledged, rather than vested in the Postmaster General, as part of his necessary administrative authority; but the act of 1836 puts an end to all possible doubt upon the subject, and confirms the practice of the department.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

The Hon. C. A. WICKLIFFE,
Postmaster General.

AID TO DISTRESSED SEAMEN.

Seamen on board ships-of-war are not entitled to pecuniary assistance from consuls under the acts of 1792 and 1803.—[Review of former opinion, *ante*, p. 683.]

OFFICE OF THE ATTORNEY GENERAL,

October 28, 1841.

SIR: I have, in compliance with your request, looked again into the acts of 1792 and 1803; for, the latter being supplementary to the former, they must be read together as *in pari materia*. I still think the true construction of the fourth section is that which the Auditor has put upon it, and which he informs me prevailed from the first, and was uniformly adhered

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to until a year or two ago, when a late Secretary of the Navy insisted on the other. This is exactly one of those cases wherein the favorite maxims of the law, that contemporaneous construction is the best, and *minime mutanda sunt quæ certam interpretationem semel habuerunt*, are to be applied; for it is one in which much may be said on both sides of the question with equal plausibility and force. I mentioned, in my former opinion, that I came to the conclusion which it conveyed, against a very strong first impression to the contrary. Certainly nothing can be more comprehensive than the words, and nothing is clearer than the hardship of not making provision for mariners of the government ships, if no provision be, indeed, made for them. But yet it does not follow that it is the business of the Secretary of State to see to that, since there is a department specially charged with all the concerns of the navy of the United States. Still less does it follow, if there be a fund made up out of the wages of merchant seamen alone for the very purpose of paying the passage of destitute merchant seamen back to the United States, that mariners who do not contribute to that fund should draw from it. Now, you are mistaken in supposing me to confound this fund with another fund, provided under the act of 1802, ch. 51, for the relief of *sick and disabled seamen*. That to which I refer is constituted by an express provision of this very act of 1803, now in question, and in the section immediately preceding the one upon the words of which all this difficulty has arisen. It is the management of this fund that is confided to the Department of State, as having charge of our consular establishment; the other, as you say, is disposed of under the superintendence of the Secretary of the Treasury.

Still, as the 4th section is so very sweeping, and as you seem to affirm that the fund out of which these payments are made is a mere general appropriation, and as, furthermore, the consuls, &c., are directed to provide for destitute seamen, "subject to such instructions as the Secretary of State shall give," if your department has heretofore either expressly or impliedly given instructions in conformity with the new interpretation of this act, it may be a question for the Secretary to decide, according to his enlightened discretion, whether that construc-

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tion ought not to be adhered to in all cases in which consuls have actually made advances in conformity to orders made under it of late years.

On the whole, I have only to repeat, that I think it advisable, as a general rule, to adhere, in all cases, to a settled construction, especially when it appears to be, in itself, rather the better, on the strict principles of interpretation, and has the advantage of being the contemporaneous exposition of the State Department. But had the practice conformed to the opinion you have expressed, I should have thought it just as inexpedient to change it in so doubtful a matter. The Auditor has adhered to the *via trita* which is the *via tuta* for him. If the Secretary, on a full survey of all the facts connected with the case, (of which, of course, he is far better informed than I am,) think this construction so highly inconvenient as a repeated call for my opinion would seem to imply, it is in his discretion to adopt the other. Perhaps a declaratory statute would be the best means of putting an end to all difficulty, and reconciling the two branches of the service together.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

FLETCHER WEBSTER, Esq.,

Acting Secretary of State.

PAYMENT OF THE FLORIDA MILITIA.

The government is not bound to pay such of the Florida militia as disbanded voluntarily, and without authority, and refused to render service. Nor is the government bound to pay such as were mustered, and then directed to repair to their homes, to remain in readiness to serve at a moment's notice. The disbanding was a virtual discharge from *actual* service; and, during such discharge, they were not entitled to pay as soldiers of the United States.

OFFICE OF THE ATTORNEY GENERAL,

October 30, 1841.

SIR: Your letter to me of the 28th instant, which I had the honor to receive yesterday, is in the following words: "In pursuance of the verbal request made by you this morning, I proceed to state what I conceive to be the questions involved in the dispute that has arisen respecting the payment of the Flor-

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ida militia. The main question is, whether the United States are bound to pay militia for the time intervening between their being mustered into service and their being discharged formally, without inquiry into the fact of their having actually served during such intervening time? This question subdivides itself into two: 1st, whether the government is bound to pay such militia as shall have disbanded voluntarily, and without authority, and refused to render service? and, 2d, whether the government is bound to pay such militia as were duly mustered, and then directed, by competent authority, to disband and repair to their homes, and remain in readiness to serve at a moment's notice?"

I had, in compliance with your previous request, considered the subject of the claim for payment of the Florida militia, as it was exhibited in the papers of the proper officers which accompanied that request, and in a written argument in favor of the claim, submitted to me by the Hon. Mr. Levy, delegate of the Territory. The subject has challenged from me a degree of attention proportioned to its novelty in one of its aspects, and to its gravity and importance in all. Neither have the difficulties I have felt in regard to it, considered as a mere question of law, been at all diminished by the precedents which I have succeeded in hunting up in the course of my researches. There is no opinion, so far as I have been able to discover, on the records of this office, on the very points stated in your letter. One of my learned predecessors, indeed, acting in another capacity, did, I find, (see record in your office,) pass upon a similar claim in his capacity of Acting Secretary of War, and allowed it. This was in the case of the Tennessee militia called out in the summer of 1836, and discharged or disbanded by General Wool, under an express order that they "should return to their homes and there wait, *without pay*, the further orders of the President, or the commanding officer for the time being." Afterwards, by the interference of one of the representatives from Tennessee, the claim of the military to pay, after this order of dismissal, was pressed upon the Department of War; and, on the 29th December of the same year, the Acting Secretary, Mr. Butler, on a full examination, as he himself states, of the whole case, and upon reference had to former

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precedents, decides that notwithstanding the express condition imposed by the order of General Wool when they were disbanded, and notwithstanding the admitted fact, as it should appear, that they had rendered no further service during the time for which compensation was claimed, full pay should be allowed them. You are respectfully referred to the documents in that case, which will speak for themselves. As to the precedents alluded to, but not cited by Mr. Butler, I have had no means of looking into them, and so am quite unable to say how far they might be (in my view of the case) fairly entitled to the weight which is conceded to them in the judgment of that gentleman. This circumstance I regret the more, not only because, with all my respect for his learning and ability, I feel myself under the painful necessity of dissenting from the opinion by which he has implicitly sanctioned them, but because one of those precedents happens to stand out in strong relief in our history, and to convey to us, as I have always understood, an admonition from pre-eminent authority in questions of military service and duty altogether irreconcilable with the precedent in question. General Jackson raised, in 1812, a volunteer corps of militia, which, in December of that year, was mustered into the service of the United States. With this corps he repaired to Natchez, and was scarcely arrived there when he was directed by the Secretary of War to discharge his troops. This the general refused to do, but, having led them back to Tennessee, disbanded them in the spring of 1813. In the autumn of the same year they were again called out, and, having been in service until December, they claimed their discharge, on the ground that, by the act of February 6, 1812, the volunteers received into the service of the United States were bound to continue in service only for the term of twelve months after they should have arrived at the place of rendezvous, unless sooner discharged. This they claimed to have done, and were breaking up, when their general opposed their movement, and kept them in arms for a while by a display of military force, insisting that the service intended by the statute was a *bona fide* military service, and that their obligations to the government were not fulfilled by the mere lapse of twelve months between their first muster and their last. This was the opinion.

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of a soldier speaking the sense of what was due from a soldier under a contract of service, and weighs with me, I confess, infinitely. I have not been able to ascertain what was the definitive decision of the government in reference to this case, but have been informed that these troops received no pay except for the term of actual service. You will, of course, employ the more effectual means which are at the disposal of your department to verify the facts. The precedent is too important to be omitted. Should it be found, on examination, that the opinion of the Acting Secretary of War, in 1836, only conformed to and confirmed that of the Executive at so distant a period, and under circumstances so well fitted to give it authority, I should scarcely undertake to advise you to set up a new rule. But if, as I cannot but be persuaded, it turn out that the decision then was *flagrante bello*, to pay for nothing but *actual* service, in the strict sense of that word, then I should have no hesitation in saying that the precedent of 1836 ought to be overruled.

I will now state, as briefly as possible, some of the reasons that have led me to that conclusion. The constitution of the United States, in its fifth amendment, has the following express provision: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except—first, in cases arising in the land or naval forces; or, second, *in the militia, when in actual service, in time of war or public danger.*" Whatever power the Executive or Congress itself may have over the militia, it is quite clear that, under this amendment, no militiaman can be subjected to martial law, except he be in actual service; and that, under circumstances requiring actual service, no act of the legislature, no instructions from the Executive, no order of any general officer, can place a citizen under the responsibilities of a soldier, except when a pressing exigency requires actual military service, and then only so long as it does require such service.

It strikes me at the very outset as a confusion of all the landmarks of the constitution, to create a condition of service to which the law of war, and the powers of the federal government arising out of it, are clearly inapplicable, and yet to call

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that *actual service* according to the constitution. The idea is, that a body of militia once mustered, may be immediately disbanded and sent home, and that they are still subject to martial law, provided only they be ordered at some future day, and on some remote contingency, once more to assemble, in order to be discharged. Thus, under the acts of Congress, volunteers are held to service twelve months; every day of this time, according to this notion, they may be scattered over the country, engaged in their ordinary avocations—keeping lighthouses, arguing causes, &c.—and yet all that time be in actual service, and subject to the rules and articles of war, and liable to be tried, not by a jury, but by a court-martial. I have very little doubt that, if ever a trial under such circumstances should occur, this whole system of nondescript service would be pronounced unconstitutional. I feel strengthened in this conclusion by all the analogies of our legislation on the subject of military service, as well as by the judicial authorities. Thus it has been ruled that it is only when called out into actual service that the militia are subjected to the exclusive control of the federal authorities. Until detachments from it have been actually mustered, to be subjected in a solemn and authentic form to the articles of war, as in the parallel case of voluntary enlistment, the body of the people, armed and disciplined in self-defence, (for that is the definition of the militia,) stand in all respects upon the same footing as in any other of their great political relations. Nor will any thing short of this formal dedication, so to express it, of portions of it to military responsibilities, and actual embodying of them into masses, under the rules and regulations of war, constitute them a part of the federal army. It is not any preparation, organization, or training for service; nor the being draughted and set apart for service; nor the being armed and equipped, arrayed, and held in readiness to march at a moment's warning—however inconvenient all this may be to the citizen—that constitutes the actual service contemplated by the constitution and the law. All this is incident to the very idea of a militia—that is, an armed and disciplined people, under any circumstances and in every state of society. The old commission of array, to which Blackstone alludes, commanded the sheriff to make proclamation, on any

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appearance or threat of foreign invasion, that all men fit for service should arm and array themselves, and continue in arms and array, so as to be ready at a moment's warning, at the king's order; yet this was no actual service. In strict conformity with this view is the decision in the much litigated and leading case of *Houston vs. Moore*, 5 *Wheaton*, 1 *sec.* The plaintiff in error in that case had refused to march under orders from the governor of Pennsylvania, issued during the last war, at the requisition of the President of the United States; and it was held that, not having arrived at the place of rendezvous, and been mustered into the service of the United States, he was still subject to the militia laws of the State. So in case of volunteers. In all the various acts passed to authorize the President to receive the services of such, the same distinction as to actual service, and any other kind of service, is kept up. Take one (the first of all) as a specimen—act of 24th February, 1807: It ordains that any company, &c., thus offering itself for service, shall be liable to be called upon to do duty at any time the President of the United States shall judge proper, within two years after he shall accept the same, and shall be bound to continue in service for the term of twelve months after they shall have arrived at the place of rendezvous, unless sooner discharged; and when called into actual service, and *whilst remaining therein*, (these words are very remarkable,) shall be under the same rules and regulations, and be entitled to the same pay, &c., with the troops of the regular army. Furthermore, that the President of the United States shall be authorized to organize the companies so tendering their service into battalions, &c.; but, until called into actual service, such companies shall be bound to do regular militia duty, as is required by law, in like manner as before the passing of this act. And, finally, it is only in case any volunteer above mentioned, while in actual service, shall suffer any damage by injury done to his horse, or by loss of the same, *without any fault or negligence* on his part, that a reasonable sum shall be allowed him to indemnify him. All the other acts of the kind are to the same effect. (See act of 1812, referred to above.)

The actual service thus expected by the government and

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exacted by the whole tenor of its legislation, is not simply a constructive actual service—that is to say, it is plainly not enough to satisfy the spirit or the letter of the acts just referred to, that detachments of the militia have been called out and mustered into service. They must serve as regular troops serve; they must serve up to the whole extent of duty and responsibility under the articles of war. As Judge Washington, in delivering the judgment of the court in *Houston vs. Moore*, expresses it, (if authority be wanted to establish a truism,) “it would seem to border on absurdity to say that a militiaman was in the service which he had refused to enter;” or, I will add, in which he had refused to continue, or had not in fact continued. There is nothing in military service which distinguishes it from any other, and exempts it from the equitable principles which govern cases of work and labor done.

The act of 1795, like the act of 1812 and all the others, declares that no militiaman shall be compelled to serve more than three months after his arrival at the place of rendezvous, in any one year. We have seen the construction which General Jackson placed upon these words. So at common law the tenant by *escuage* was bound to serve forty days; and if his lord distrained him for the *escuage* so assessed, it was necessary that he should plead and aver that he was with the King forty days;—*Lit.* 102: that is to say, military service put on the footing of contract is subject to the usual law of contract, and the rendering of a *quid pro quo*. The argument, however, on behalf of the present claim, is, that admitting that actual service is necessary, yet that actual service is a fiction, and that troops having been once mustered into it by the commissaries of the United States must be intended to have continued in it until regularly mustered out of it: in short, that the presumption arising on a muster-roll regularly made, is as against the United States a presumption *juris, et de jure*, to the contrary of which nothing can be averred. The Paymaster General, the Commission of Officers, and the Comptroller of the Treasury, all concur that no such principle in their opinion exists, or ought to exist, in the practice of the government; and the facts which are presented in their reports abundantly show that such a principle would, if once established, be fruitful of iniquity and imposition.

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Is any such principle known to the laws as that the government, standing in the relation of a defendant in a question of contract, of payment, of pecuniary equivalent for damage suffered, or services rendered, is estopped by the acts of its own officers, however negligent or fraudulent, and bound in a constructive liability to any extent, though it be ever so clearly demonstrated that no liability in fact exists? To this length the principle must go, if it is worth anything at all. I answer, that I have never met with anything like an authority to countenance such a proposition, and that all the analogies seem to me utterly irreconcilable with it. The government suffers by no *laches*, is generally exempt from the effects of the *summum jus*, and cannot be sued so as to be bound only *in foro conscientie*.

That the certificate or return of the mustering officer is *prima facie* evidence of what it imports, I concede, and, *donec probetur in contrarium*, would be binding in law, and ought to be binding upon the government in the absence of all suspicion of actual collusion or gross negligence. But, in the case before you, the evidence seems clearly to repel the presumption just stated, and to satisfy the utmost exigency of the law. At least, whether it does or not, for the purpose of this argument in answer to one of your questions, it must be assumed to have that effect. You will agree with me, I think, that there is a difference between the case of the government seeking to compel service under the statute, or to punish failure in rendering it, and that of recompense or payment claimed for pretended service. If a man were taken up and tried for a deserter because, after the six months elapsed, during which, under the act cited, he could be held in actual service, his producing the muster return might very well insure his acquittal, though he could not show that he had been mustered out of the service, or that he had served at all. But would such an acquittal be conclusive evidence in the claim upon the government for the full amount of his wages? Assuredly not. As to the value of horses, &c., the unreasonableness of such a rule is still more apparent. The extreme jealousy of the law upon the subject of actual presence in camp and corps of every man liable to duty as a soldier is clearly shown by the severity with which

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it punishes officers guilty of imposing upon their superiors in the slightest degree in the matter of muster certificates, &c. The Articles of War abound in the sternest provisions to secure the public against any possibility of fraud in so vital a particular. It is clear that, in actual service, the absence from duty falls, in contemplation of law, little short of desertion, as, indeed, it is fatal to discipline. The soldier must be at his post, within the sound of the bugle or the drum. He must never, except in the special case of a furlough, which is always limited, be out of sight of his superiors. Information of his presence must be continually communicated to headquarters. Disbanding, or anything like disbanding, seems to me inconsistent with the very idea of a regular armed force and of actual military service; and the Articles of War show that my impressions on a subject with which I am only theoretically acquainted coincide with the conclusions of practical soldiers. (See act April 10, 1808, articles 13, 14, 15, 16, 17, 18, 19, 21, and also, as to losing or spoiling of horses and arms, 38.)

But it is argued that these very articles, by punishing, were intended to prevent such neglect or breaches of duty. If you omitted to punish, say they, you have no right to complain, and it is too late now to take advantage of previous omissions. Certainly it would be so, were our present object punishment, or any exercise of sovereign authority over the pretended soldier. But it is not so. It is a mere question of *meum* and *tuum*. It is a matter of contract, as Mr. Levy very truly argues; and what you have to decide is, not whether the absences and defaults in the present instance may be subjected to penalty, but whether a man guilty of them can claim to be paid for them as if they had been services. That is altogether a different matter, and one about which I really cannot entertain a doubt.

In the regular army, such a case as that presented in the papers before me could not possibly occur; yet the strictness with which any attempt to foist into the ranks, or in the place of a soldier, and who is not in fact doing duty as such, is remarkable. Thus, in the Articles of War, of force during the Revolution, and for years after it, it is expressly provided (section 2, article 7) that any officer who shall presume to muster any person as a soldier, who does not actually do his duty as a

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soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly. (Cross, 16.)

As to the idea that this disbanding of a whole *corps d'armee* for an indefinite period is a mere furlough, it is to treat an exception as the rule, and put on the same footing the occasional absence, which does not impair the unity and scarcely the strength of an imbodyed force, with the total dissolution of that unity. But, besides, it furnishes no answer to the objection that, under our constitution, a detachment of the militia thus disbanded ceases to be in actual service, and falls back into the body of the people. I conclude by applying these observations to your questions as you have necessarily propounded them.

1. To the first, I answer unhesitatingly in the negative.

2. The second is a more difficult one in itself, and rendered more so by the precedent of 1836 cited above; but I am, upon the whole, of opinion (in the absence of other and stronger precedents) that the disbanding was a virtual discharge from *actual* service, and that during such discharge they were not entitled to pay as soldiers of the United States. And lastly, I consider the government as in no case, which takes the shape of a claim of damages or contract, estopped by the returns of a mustering officer, but entirely free to look into the facts of the case on proper evidence.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Hon. JOHN C. SPENCER,

Secretary of War.

NOTE.—Since this opinion was written out, the evidence has been discovered to show that the fact, as to the payment of the Tennessee volunteers in 1812 and 1813, was that they received compensation according to General Jackson's idea of their obligation to serve—that is, only during the time they were actually in the field—and so fully maintains the argument which had been hypothetically put in the absence of that evidence. It deserves also to be added, that the case of the Tennessee militia in 1836 was one of *volunteers*, who are a *quasi* regular force, and so is by no means so strong a one as that of ordinary militia, who, when disbanded, according to the argument, fall back into the ranks of armed citizens—armed and arrayed under a commission of array.

H. S. L.

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SALES OF PUBLIC LANDS IN THE TERRITORY OF ORLEANS.

It has been the position of the United States, since the delivery of the opinion of Mr. Wirt, that the acts of 26th March, 1804, erecting Louisiana into two Territories, and that of the 2d March, 1805, for ascertaining and adjusting the titles and claims to lands within the Territory of Orleans and the district of Louisiana, extended to the country west of the Perdido, to which the United States have always asserted, and at length enforced their right under the treaty with France in 1803, and that between the government and Spain in 1800.

The Indian right of occupancy having been fairly extinguished by treaty, and the government having come to be in full and complete possession of the lands in question, it had become both expedient and necessary that they should be surveyed and put into market.

The surveyor of lands of the United States south of Tennessee was authorized to cause the surveys to be made; and his approval of the plats thereof is a sufficient authentication of both the survey and the plats.

There has been no form for the surveyor's approval of plats prescribed. The substance and spirit of the whole policy in respect to approvals were, that the surveyor should not only cause the lands to be surveyed and platted, but should see to it and satisfy himself that the plats corresponded with the field-notes; and when satisfied, to return the plats to the proper office.

The President had a discretionary authority to proclaim these lands for sale immediately upon being informed that the surveys were made and proper land officers appointed to conduct them.

Purchasers are chargeable with notice of the law respecting all former grants by Spain and France, and in relation to pre-emptions.

In the case of an erroneous sale, in any respect other than failure of consideration by reason of want of title in the United States, the Secretary of the Treasury has no power to refund the purchase money, but relief must be sought at the hands of Congress.

Nor ought a patent to issue so long as the surveys remain confused; but the same may be properly suspended until a report can be had, or the facts concerning the lands be more fully ascertained.

OFFICE OF THE ATTORNEY GENERAL,

November 1, 1841.

SIR: I have bestowed upon the subject of Mr. Woodruff's claim, referred to me in your letter of the 26th September, as patient and thorough an examination as was consistent with the limited time allowed me for it, and an extraordinary pressure of other business. That the conclusion to which that examination has brought my own mind will be altogether free from difficulty to yours, is more than I dare promise myself. The questions involved in the case are many, and several of them have been matters of doubt with your predecessors and mine. I have endeavored to meet them fairly; whether I have done so successfully is for others to decide.

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Mr. Woodruff comes, in the language of his professional advocate, "either to have his patents issued, permission to locate elsewhere, or to have his purchase money refunded. In the process of investigation, he has become satisfied that he cannot have the first or second [branch of the] alternative, and consequently only asks for the refunding of his purchase-money." If I confined this opinion to the single point which, under this modification of his own case, the claimant has thought fit to submit to you as the ground of his application, my task would be speedily and easily performed, since I am very clear that, whatever other relief you may grant, you have no power to refund the purchase-money under the circumstances. The act of 12th January, 1825, which, so far as I know, is the only statute that provides for such a case, is as explicit and decisive as language can be. The title, it is true, is vague and false, and has, no doubt, misled more than one superficial reader of it. According to that, it is "an act authorizing repayment for land erroneously sold;" and hence it has been inferred that, in all cases whatever of erroneous sale, it was competent for the department to restore the purchase-money. But that is by no means the true construction of the statute. The title is no part of it; and the words of the act itself leave no room at all for doubt as to the classes of cases in which it affords a remedy. There are *three*, and only *three*, modifications of one class, rather than three distinct classes: "The purchaser of a tract of land from the United States, the purchase whereof may be void,"—not absolutely, not universally, but void by reason of, 1st, a prior sale thereof by the United States; or 2d, by the confirmation or other legal establishment of a prior British, French, or Spanish grant thereof; or 3d, for want of title thereto in the United States from any other cause whatever,—"shall be entitled to repayment of any sum or sums of money paid for such tract of land, on making proof, to the satisfaction of the Secretary of the Treasury, that the same was *erroneously* sold." How? Not absolutely, not universally; but, "in manner aforesaid, by the United States, who is hereby authorized and required to repay such sums of money paid as aforesaid."

Nothing, I repeat it, can be more clear and precise than this

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act. It plainly embraces the single category of failure (total or partial) of consideration, by reason of want of title to the whole or to part of the land sold. The sale was to be treated as null and void, as it clearly was on general principles, because there was nothing to be sold—no subject-matter of a contract of sale; but to extend the operation of the statute to other cases of erroneous sale was to take a liberty, by a most forced construction, with words too explicit to need any interpretation at all. The practice referred to in a letter, of which a copy has been furnished me, (8th November, 1837,) from Mr. Secretary Woodbury to the Commissioner of the General Land Office, falls fairly within the purview of the act of 1825. It is the practice of refunding the purchase money in cases of private entries, to which pre-emption claims have been established.

The Secretary says he "sees nothing so objectionable in it as to require a change after this lapse of time." He speaks doubtingly of it, and seems to intimate, that were it a new question he might decide it otherwise. Yet, if the land has, according to law, become the subject of pre-emption, it is *ex vi termini* no object of sale. The United States have parted with all their title in it by relation back, and so it was a case void, by a prior sale, within the very words of the act. I admit that this view of the retrospective operation of the title by pre-emption, avoiding *ab initio* a private entry made subsequent to the settlement, is not taken by Mr. Whitcomb, late Commissioner of the General Land Office, in his letter to Mr. Woodbury, on the occasion first mentioned. He there puts the practice in question upon grounds of convenience and expediency, which I cannot acknowledge to give any authority to the Executive to extend the remedies provided by the legislature for one class of cases to another, essentially distinct from it. But in fact there was no need of any such extraneous consideration: the sale to the pre-emptioner, although but an eventual one, when once completed according to law, had all the effect of a conveyance dated at the beginning of the settlement, and so was a prior sale and literally within the statute.

Other cases have been cited in which it seems the department has heretofore ordered the purchase money to be refund-

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ed, though the title of the United States to the land sold was incontestable. Now, although the sales of the public lands being part of our public law, and matter, besides, of general notoriety, much might be said on general principles against allowing a purchaser in any case to recover his money paid on an alleged mistake in law, against which the exercise of common prudence would have protected him; and although an exception which is a departure from a settled principle is never to be extended any farther than practice has carried it, yet I am willing to give all the weight of precedents to these irregularities, and shall only require that the case before you be brought rigidly within them.

What are these cases? The first is one in which part of the land sold to Judge Smith of Alabama having been already disposed of, the then Secretary of the Treasury ordered a deduction *pro tanto* to be made, and the amount refunded to the purchaser. Now this deduction was clearly within the statute; a part of the land having been sold, the sale was *quo ad hoc* void, because of a prior sale. The only wonder is that the Secretary, who made a decision so obviously righteous, should doubt its legality. Like other sensible people who are not very learned in the law, his judgment was right, though marred by the reason he gives for it. Other cases cited are lands reserved for sites of forts—that is, taken out of commerce—made what the civilians call *res sanctæ*, no longer the subject of a contract of sale, and so the sale of them null and void for want of a subject matter; the government having indeed a title, but a title to a thing not subject to alienation. So lands reserved for the satisfaction of Spanish claims, and therefore previously appropriated and *pro tanto* alienated; so lands never surveyed at all, and not yet become objects of bargain and sale to individuals. These, together with some few cases of pre-emptions declared void, are all the precedents on which the repayment of the purchase money in the present case by the executive department, without any special authority of law, is attempted to be excused.

I regret that, whatever may be the hardships of Mr. Woodruff's case, (and I am not disposed to deny that it is a hard one,) I cannot advise you to assume the responsibility of satis-

fyng his claim in the only manner which seems quite agreeable to him on the strength of such examples. He may have an equitable claim upon the treasury, but no money can be drawn out except according to law.

I see nothing in the case, so far as any evidence has yet been furnished, that gives the least color to this pretension. What changes may be made by further development of the facts, I am, of course, not called upon to conjecture. Before I proceed to answer the questions propounded to me, I must premise that fraud was distinctly charged against the surveyor general, Turner, by Mr. Woodruff, in an oral argument held with me at my office upon this subject. I need not say that fraud is a thing to be clearly proved, and never taken by presumption. There is nothing upon the face of the papers before me, nor in any document to which my attention has been called, that gives the least countenance to such a charge. On the contrary, in one of the letters of Mr. Commissioner Graham, of whose judgment and ability in business I have conceived, from those letters, a very favorable idea, I see the most honorable mention made of Turner's industry and fidelity in the discharge of this duty.—(Collection of Laws, Instructions, &c., relating to the public lands, vol. 2, p. 900, Sept. 25, 1829.) This charge, therefore, of misconduct on the part of the surveyor general, must be laid entirely out of the case.

The Commissioner of the General Land Office being clearly of opinion that Judge Woodruff's proposal, to locate an equal quantity of land elsewhere, is not to be seriously entertained, I confine my answer to the two other branches of the alternative proposed, viz: the refunding of the purchase-money by the department, or the issuing of the patents. Of the former of these two heads, I have disposed in the preceding observations. It remains to inquire whether specific performance of the contract on the part of the United States, by the granting of patents, could be effected under the circumstances, without any additional legislation; and, if not, then what course it may be most advisable to pursue in the premises?

I agree with the Commissioner, that the question is full of difficulties; and, in submitting to you the conclusion to which I have been led by my inquiries, I repeat, that I pretend to

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nothing more than the respect due to the results of deliberate and impartial investigation. The questions precisely propounded to me in the letter of the Commissioner, which accompanied yours, shall be taken up *seriatim*.

1. "Had the surveyor general of Louisiana (he means, I presume, the surveyor of lands of the United States south of Tennessee) any authority to survey the public lands in that district?" I answer, that I have no doubt he had, and that his approval of the plats was a sufficient authentication of them under the law. Doubts on this subject were long ago entertained and resolved. It appears, from the Collection of Laws, Opinions, and Instructions, relating to the public lands of the United States, vol. 2, p. 38, that a former surveyor general denied his own authority to execute this duty, and that, on the question by the then Commissioner of the Land Office to one of my predecessors, (Mr. Wirt,) the opinion of that distinguished lawyer was clearly against the surveyor general. This opinion, which is equally brief and decided, was bottomed on a very able statement of the whole case submitted by the then Commissioner, to which your attention is respectfully invited.

Mr. Wirt said: "1st. I entertained no doubt of the authority of the President to order a survey of the public lands lying south of the 31st degree of latitude, and which formed a part of the Territory of Orleans.

"2. Although there is some ground for doubt on this question, I am of opinion that the surveyor south of Tennessee and the surveyor of Alabama, respectively, are the proper officers to approve and certify the township plats of public lands which are directed to be returned to the land officers and to the Treasury Department in that district of country lying south of the 31st degree of latitude, and which formed a part of the Territory of Orleans, so as to give authenticity to them."

The idea both of Mr. Graham and Mr. Wirt was, that the acts of March 26, 1804, erecting Louisiana into two Territories, and that of March 2, 1805, for ascertaining and adjusting the titles and claims to lands within the Territory of Orleans and the District of Louisiana, extended to the country west of the Perdido, still claimed by Spain as part of Florida; to which, however, the United States have always asserted, and at length

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enforced, their right, under the treaty with France in 1803 and that between France and Spain, at St. Ildefonso, in 1800.

By the 7th section of this act, the powers vested by law in the surveyor of lands of the United States south of the State of Tennessee were to extend over all the public lands of the United States to which the Indian title should have been extinguished; and it was made his duty to cause such of the lands as the President should expressly direct to be surveyed and divided, as nearly as might be, in the manner provided in regard to the lands northwest of Ohio. The contemporaneous construction of this act by Mr. Gallatin is shown to have been, that the law was applicable to the whole territory claimed by the United States under the treaty of 1803.

It deserves to be remarked here—but the remark is one of which we are never to lose sight in discussing subjects connected with the land laws—that these laws, however local they sometimes appear to be in particular provisions, constitute, in truth, one general system, characterized in the main by the same great outlines; and are, therefore, all to be taken as *in pari materia*. In this observation, I am only repeating an opinion of the same distinguished predecessor, in this office, whose authority I have been vouching on another point.—(Collection of Instructions, &c., vol. 2, p. 31.) But this by the way.

We have seen that the powers of the surveyor of public lands south of Tennessee were confined, in the act of 1805, to the surveying of such lands, in the Territory of Orleans, as the President should expressly direct. The act of 25th April, 1812, for ascertaining titles and claims to lands in that part of Louisiana which lies east of the Mississippi, &c., received (section 6) the grant of powers vested by law in the surveyor of public lands south of Tennessee; but omitted the qualification just mentioned, and extended those powers over all the lands, indiscriminately, in the said tract of country. Mr. Wirt's view of this subject was, that the power having been granted to the President by the act of 1805, and not revoked by this affirmative statute, still continued in him; and were it, in my view of the case, at all necessary to the validity of any survey made by the surveyor south of Tennessee, I

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should certainly invoke this clause in the preceding statute, as far as it could be reconciled with the provisions of the act of 1812; but I hold it to be unnecessary.

The act of 1805 contained a restriction upon the surveyor because the possession of a part of the country was still claimed, and even held, against the United States, by a foreign government; and how far that government should be suffered to continue in possession, and when and how it should be finally turned out of it, was a purely political question, which Congress, conforming its legislation to the law of nations, in this particular, wisely committed to the discretion of the Executive. In 1812 the United States were in possession; all obstacle to the execution of their laws in that district was removed. There was no reason why the powers of the surveyor south of Tennessee should not be exercised over the public lands in that Territory, as freely as in any other part of his jurisdiction; and, accordingly, from that date, I consider him as having precisely the same authority there as had been vested by the act of 1796, the great fundamental constitution of the domain in this country, in the surveyor general of the Territory northwest of the Ohio. This is the express language of the act of 3d March, 1803, section 10, (an act regulating grants and providing for the disposal of the lands of the United States south of the State of Tennessee.) Then the question is, "What were the powers of the surveyor general in the northwest under the act of 1796?" They were to carry into full effect the great scheme of disposing of the vast domain of the country, as soon as possible, with all the precision of a mathematical arrangement, with a view, at once, to accuracy in the public accounts, to facilitate sales, to certainty in titles, and to the laying the foundations of that great social order which has been since built up in that wilderness, and the speediest improvement of the country and increase of population.

He is enabled, therefore, to engage a sufficient number of deputies, (without other stint than that it be sufficient,) to lay down rules for their government, to bind them by an oath of office, and to remove them at his pleasure for negligence or misconduct. His power is thus proportioned to the trust it was intended to execute. After many directions in detail for

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the execution of the surveys, according to the regular principles adopted for them—the making and preserving of plats, &c.—it is ordained in the 4th section that, as soon as seven ranges of townships shall have been surveyed, and the plats thereof executed and transmitted, the lands shall immediately be offered for sale. These are the powers and the duties of the surveyor general—to survey as soon and as perfectly as possible; to survey without waiting for the orders of any superior; to survey with a view to a speedy sale; at all events, to survey. It is clear that, according to the whole scope and spirit of the act of 1796, if the surveyor general is in any case whatever not to proceed forthwith to survey the public lands, that case is an exception, and the burden of proof is upon him that affirms it to exist, to show the special law by which it was created. Now, all these powers and duties were, by the act of 1803, ascribed in express terms to the surveyor south of Tennessee. Whenever, therefore, his powers are extended over any new tract of country, by virtue of an act of Congress, the order to survey the public lands in it as soon as possible, with a view to speedy sale and improvement, is implicitly conveyed by the same statute. Therefore, the omission in the act of 1812 of the words “by the direction of the President,” had no effect whatever to defer the surveys which the surveyor general, by virtue of the general law, was empowered and enjoined to execute. It will not be pretended that the act of 1819 made any change whatever in this particular. By that act the surveyor general is authorized to appoint a deputy surveyor, whose business was to be the executing of the surveys of private claims. Of course this provision left the powers of the surveyor general, in regard to the public lands, just where they were before, and left him with the same discretion as before as to the choice and the manner of choosing the deputies, for whose performance of their duty *he* was responsible to the government. As to the objection that he did not, in the case under consideration, in fact perform his own duty in this respect—first, because the surveyor general (Mr. Davis) refused to have the surveying done; and, second, because the original plats (as they are called by Mr. Woodruff) were not duly approved, but copies of them—I am, on the fullest reflection, satisfied that neither of these objections ought to prevail.

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As to the approval, there is no indispensable form prescribed. The substance of the thing—the spirit of the whole policy was, that the surveyor general, to whom, as we have seen, a high and important responsibility in this respect was confided, was to be satisfied, by comparing the field-notes with the plats, that the latter corresponded with the former. The field-notes were the original—just as much so as the entries in a shopkeeper's day-book. It was upon these, and these alone, that he was instructed by the lawgiver to rely. He was to take no evidence short of these; and, if he had these, he was to require no evidence beyond them. As soon as by actual comparison he was satisfied that the plats corresponded with the notes on which they purported to have been formed, he was to transmit one of them to the Secretary of the Treasury—another to the land offices; and on this the authentic title, executed by a competent officer, according to law, the sale was to be made and the patent to issue.

This is a plain stating of the principle. The practice conformed to it. Thus, in the Collection of Laws, Instructions, &c., vol. 2, p. 861, there is an instance mentioned in which the recording the private survey, and the return of the township plats, including it, is considered as a virtual approval. So it is said at pp. 935, 936, of the same work, in relation to this very deputy surveyor in the district east of Orleans.

The examining and recording for which these deputies were to receive the fee of 25 cents, &c., I consider to be the examination of the field-books of the deputy, in order to test the accuracy of the work, and making out the plat of survey; and the recording to be the copying of both the plat of survey and the field books of the surveyor in the record books of the office. And in a letter from the Commissioner of the General Land Office to the surveyor general, at Washington, Mississippi, of the 12th February, 1828, (same collection, vol. 2, p. 882,) certified copies were returned to the latter, because he had not approved them, and he was required, as soon as possible, to compare the plats with the field-notes, so as to enable him to certify their correctness. Other instances to the same effect might easily be cited. From all this, it is difficult to see how any objection can be made to the certificates in this case.

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The very refusal of Davis to certify, gives additional authenticity and solemnity to the certificate ultimately transmitted by his successor, Turner. This person, who, it seems, executed the surveys afterwards, became surveyor general by the express orders of the Commissioner at Washington, compared the plats with the field-notes, and, on that comparison, certified their correctness. If any objection is made to him as the deputy of the surveyor general, I see no restriction upon the power of the latter as to the choice of his deputy. He is responsible, as I have said, to the government; and what he does by another, he does himself. Stringer's lessee *vs.* Young, 3 Pet., is a case somewhat in point. As to his approving a copy and not an original, the copy is, to all legal intents, the original, as soon as he approves it, by comparing it with what, in fact, is the original—the field-notes—though these would be of very little use to any but a surveyor; and *therefore* it is, that the law requires a certified copy, and gives to it such effect as an authentic instrument. On the whole, I answer the first question in the affirmative. The surveys, so far as the evidence before us goes, are to be taken to be legal and sufficient. Before I close this head, I would call your attention particularly to two letters of Mr. Commissioner Graham, on this very subject, to the recusant Surveyor General Davis, in 1827. (See Collection, &c., vol. 2, pp. 872, 873, and 883, 885.)

2. "Had the President of the United States any authority to proclaim these lands for sale?" I think he had; and I arrive at that conclusion, in some measure, by the same course of reasoning by which the authority of the surveyor general is established. It is true that Congress alone can dispose of the public lands, or make any appropriation of them; at least, whatever appropriation may be made of them, the authority to make it must proceed directly or indirectly from Congress. But I am of opinion that Congress did authorize the President to proclaim these lands, because it authorized and enjoined the preparing them for sale. It ordered, as we have seen, that they should be surveyed—the first great step to sale; it established land offices, and authorized the appointment of a register and receiver—a second step, never taken but with a view to sale; and lastly, it did all this professedly with a view to the

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disposal of the public lands. Such is the very language of the act of 1819. Now, it is very true that *that* act, if all the conditions and regulations of a sale which had been established by general laws, such as the acts of 1808 and 1820, or which were become, by perpetual repetition for thirty years, mere words, of course, and a trivial formula had been inserted in it, would have been many times more prolix than it is. But they would have been, in the then state of the land law, the merest surplusage, and *expressio eorum quæ tacite insunt nihil operatur*.

The President has authority to proclaim all sales which are ready to be made, provided he impose no terms not strictly authorized by law, because no sales are ever made without his proclamation; and all the public lands in this country not specially, and in express words, reserved or appropriated for other purposes, are destined, by our fundamental law, as a rapidly-progressive people, to as speedy a sale as possible. As soon as land enough was surveyed, under the act of 1796, it was forthwith sold; and from that day to this, so soon as the surveyor has done his work, and the register and receiver been appointed to do theirs, the proclaiming of the land for sale by the President has followed of course. A proclamation is indispensable in all cases, and has, I admit, been, in by far the majority of cases, expressly ordered by law to be made; but I maintain that it is implied where it is not ordered, by the very nature of the thing. A proclamation of some sort—that is, notice, timely and sufficient notice—has always been required, and for obvious reasons: first, that the treasury might have a good chance of an advantageous sale; second, that all the people might have an equal chance of buying. Accordingly, it is a fundamental law, that all lands must first be offered at public sale before they are subject to private entries.

The argument that the sale is void if the President is not expressly authorized to make proclamation that it is to take place, takes it for granted that the sale itself is an extraordinary thing, and so requires a special and solemn act to warrant the doing it. If our domains, for instance, were inalienable, as most crown lands are, everything relating to a pretended sale of them would be *stricti juris*. So, where Congress ex-

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pressly reserve land, certainly the President has no authority whatever to proclaim it to be sold. But where they take no such order; where, on the contrary, they do everything necessary to a sale but proclaim it, which the President is always required to do by law, his doing it is a matter of course, and essential to protect the public against trespassers, who *will* otherwise take possession in spite of every prohibition.

In short, in this country every pre-emption is in favor of public sale; it is the first great tenure, so to express it, by which we hold our magnificent domain. This is plainly the result to be deduced from the whole tenor of the statute law of the United States in regard to the public lands, especially from the acts of Congress relating to the lands south of Tennessee. Over this whole tract of country a larger discretion has been allowed to the President than he ever had in respect of the territory northwest of the Ohio. By the act of 1796, the sale of the lands, as soon as they were surveyed, was confided partly to the governor or secretary of the Northwestern Territory and the surveyor general, partly to the Secretary of the Treasury, who was to give notice of not less than two months; and, if sales were made at different places, they should always take place at a month's interval. So, if they were suspended six months, the same policy required that the country should have notice of it through the newspapers. At this time, the President's agency in the sale was confined to an order for the issuing of the patents. As soon, however, as our population began to spread itself over those extensive territories, and especially when new and vast acquisitions were made, the necessity of committing so important a charge as the giving publicity to the sale of the domain to the head of the central government became manifest. No one could be more safely trusted with the execution of these laws than he to whom was confided the execution of all other laws; and every purpose of publicity was better answered by his proclamation than it could possibly be in any other form. Accordingly, simultaneously with the appointment of the surveyor south of Tennessee, we see (act March 3, 1803, section 12) it adopted as a fundamental law "that all lands not otherwise disposed of, &c., be offered for sale to the highest bidder, under the direction, &c.,

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on such day or days as shall, by public proclamation of the President of the United States, be designated;" with the usual provision that public sales shall be open at each place three weeks, and no longer. From that time to this, during a period of nearly forty years, I do not see a single instance in which this law has been deviated from; and public notice of a sale, which is of indispensable necessity in all cases, has become synonymous with the proclamation of the President. This established power of the President is laid under some general regulations by the act of March 31, 1808; and the act of 1820, as was observed above, also contains provisions applicable to all sales whatever.

It is true that, for many years after the act of 1803, its words were, as is usual in such cases, formally repeated in all the other acts ordering sales—the President being expressly authorized to proclaim. But, generally, the principle is recognised as established, and the President is only indirectly authorized; that is, the acts recognise his proclamation as a thing of course—an incident inseparable—a condition indispensable to a sale. Forms of expression then occur of this kind: "whenever the sale of the public lands, in such and such a district, shall have been authorized by any proclamation of the President." (Act May 26, 1824, section 3—Missouri.) At length, in several instances, as in the act of 1819 under discussion, and those cited by the chief clerk of surveys in his letter to the Commissioner, which is now before me, the special authority to proclaim is omitted altogether. Thus, in the act of 1832, (July 10,) in the acts of March 2, 1833, June 26, 1834, and July 7, 1838. It is quite evident that the clause in all these acts was regarded, as it really was under the practice, as wholly superfluous, for the sales have gone on, he informs me, as usual, under them, and no one ever questioned their perfect regularity, although all purchasers were affected with full notice of the omission by the very law under which the sale, and consequently their titles were made, as Mr. Woodruff was, or must be taken to have been, in this instance.

Indeed, the great substantial prerequisites of a sale being accomplished—first, extinction of the Indian title; second, survey of the lands; third, establishing land offices; fourth, regular

appointment of register and receiver (see Mr. Wirt's opinion, Collect., vol. 2, p. 25)—what could prevent the rushing of the emigrant population into the vacant lands? What ought to prevent it? The pre-emption acts—acts of grace continually passed by Congress, ratifying by wholesale titles thus acquired—show the sense of the country to be, that, as soon as any tract of country is ready for sale and occupation, it must be sold and possessed. But, if this is true of any part of the United States, most especially is it applicable to the whole country south of Tennessee. I have said that, in all the legislation on this subject, a larger discretion seems to have been allowed the President than in the older acts in regard to the Northwest Territory. This is probably owing to the same cause which led, as I observed just now, to the charging him with the duty of proclaiming lands ready for sale. In the progress of things, it was seen that discretion must, in such matters, be confided somewhere; and it was obviously rational and fit to trust it to the Executive of the nation.

Thus, under the act of 21st April, 1806, supplementary to the act of the 2d of March, 1805, for ascertaining and adjusting the titles and claims to land within the Territory (this very territory) of Orleans, and the district of Louisiana, section 11, the President is authorized to offer for sale so much of the land as shall have been surveyed, conformably with the act to which this is supplementary, *whenever he shall see fit*. This section relates to lands in the district of Louisiana; and by the act of 3d March, 1811, section 4, the power so vested in the President in relation to lands lying in the western district of the Territory of Orleans, by the 11th section of the act of 21st April, 1806, are extended to the public lands lying in the eastern district. So by act of 12th December, 1811, the land offices in the Territories of Louisiana and Orleans shall be respectively opened on such days as the President of the United States shall, by proclamation, designate for that purpose. So the act of 6th May, 1822, providing for the sale of lands in Mississippi, section 2, the President may cause, "when he shall think proper," so much of the land, &c., which may be surveyed, to be exposed to sale. So act of 8th March, 1823, supplementary, &c., to provide for surveys and disposal of lands

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in Florida, section 8, authorizes the President to establish land offices where he shall think proper, &c., (section 9,) so soon as land enough, in his opinion, should have been surveyed in either district to authorize the opening of them, (I call your attention to that very significant provision;) and this being done, section 10 directs, that whenever a land office shall have been established, and a register and receiver appointed, (the essential prerequisites being all executed,) the President is authorized to direct so much of the land as shall have been surveyed to be sold in the usual manner. It would be a sheer waste of time to refer particularly to the numerous other acts, by which large discretionary powers over every thing connected with the sale of the public lands in the territory south of Tennessee are vested in the President. General phrases become frequent in later acts. The law of sale being perfectly settled by so many statutes *in pari materia*, it is thought sufficient barely to refer to them. Act of 11th May, 1820, (Indiana.)

One remark must be added to the preceding. We have seen, that by the act of 3d March, 1811, the President has all the power vested in him, in regard to the eastern district of the Territory of Orleans, that the act of 1806 had vested in him in regard to the western. There can be no doubt, I think, that the construction put upon this act was the same as we have seen put upon the statute of 1805. It was considered as extending to the whole territory that passed, by the treaty of 1803, under the denomination of the Territory of Orleans. That construction is not without its plausibility, and I think it at all events too late to disturb it now. But, in my view of the subject, it is not necessary to lay any stress upon it, and so I put it entirely out of the question.

I am of opinion, upon the fullest consideration, that the President had authority to proclaim the sales in question, and was right in exercising it.

3. The next question is, whether the case of Mr. Woodruff is within the act of 12th January, 1825. I have already discussed this point, and have only to repeat that, from any thing that as yet appears in evidence before me, it is.

4. Whether patents ought to issue, under all the circumstances of the case, without further inquiry, is a point about

which I have felt a great deal of difficulty. On the whole, however, I think it would be well to wait at least for the report of Mr. King. I perceive that both Mr. Wirt and Mr. Butler, my learned predecessors in this office, consider that the General Land Office have always used a proper discretion in suspending the execution of patents in cases of serious doubt or conflicting claims until the direction of Congress or the decision of a competent tribunal can be obtained. I respectfully refer you to the opinion of Mr. Butler, in Collection, vol. 2, p. 86.

5. If the patents are not to issue, what ought to be done in this and similar cases? The passage just referred to from my learned predecessors' opinion on the preceding point indicates the course to be pursued here, if, on a further examination, it should be thought improper to issue the patents at all without a resurvey. As yet, nothing, not even the letter of Mr. Whitcomb, before me, seems to require that such a measure should be had recourse to. But, should it be discovered, on the examination of Mr. King, that the surveys are so badly executed that the whole work must be done over again, then I see no adequate remedy but in a special reference of the whole case, or rather of all the cases, to Congress. If there be still any doubt about the title under the law as it now is, an act of Congress can remove it, as has often been done. (See 9 Wheat., 481, *Doddridge vs. Thomson*; 7 Wheat., 23, *Taylor's lessee vs. Myers*; 6 Pet., 666, *Lindsay vs. Miller*.) There was an analogous case of sales of land in Monroe county, Mississippi, made at the land office of Huntsville and Tuscaloosa since 30th October, 1822, legalized and declared valid, as though made at the proper land office, &c.

Mr. Woodruff's equity is of course indisputable, and his case a hard one, although as a purchaser, with constructive notice of the state of the law on this subject, he is not strictly entitled to a very indulgent consideration on some of the points he has raised. But in regard to the alleged inaccuracy of the surveys, that was a matter of fact, of the existence of which nobody had any suspicion until after he had purchased and paid his money. That is an obstacle to his enjoyment of the property which the vendor is bound to see removed; or, specific performance being

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impossible, to return the purchase money. Congress, as the vendor, must see to this.

I ought to apologize for the extraordinary length to which this opinion is run out, but the subject is so complicated in all its bearings that I found it impossible to compress what I had to say within a narrower compass, and even now am apprehensive that I have omitted much that was necessary to bring out the whole argument fully and perspicuously.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

The Hon. WALTER FORWARD,

Secretary of the Treasury.

EVIDENCE BEFORE COURTS-MARTIAL, &c.

There is no doubt of the competency of the evidence of the prosecutor before a court-martial; but how far his credibility may be affected by the relation in which he stands towards the accused, is a question of discretion for the court itself.

The prosecutor may, after giving evidence, remain in court to conduct the prosecution. (2d McArthur, p. 53.)

OFFICE OF THE ATTORNEY GENERAL,

November 25, 1841.

SIR: I had the honor to receive, yesterday, your letter covering one from Henry M. Morfit, esq., judge advocate, which propounds the following inquiries: "In the preliminaries of the trial of Lieutenant George F. Lindsay, before a general marine court-martial now in session at this place, the judge advocate proposed that, after examining Lieutenant Alexander G. Gordon of the navy, upon whose information the charges and specifications were preferred, the witness should be permitted to remain in court as the prosecutor, to aid, by his suggestions, the judge advocate in bringing out the evidence. The court, being desirous to proceed with all regularity, and there being a contrariety of opinion among the members as to the usage in such cases, have directed me to address the Secretary of the Navy this letter, respectfully requesting him to submit the inquiry to the Attorney General, so that in this and future trials the practice may be settled."

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1st. My opinion is, that there can be no doubt of the competency of the evidence of the prosecutor. How far his credibility may be affected by the relation in which he stands towards the accused, is a question of discretion for the court itself.

2d. I consider it as settled law in England, that the prosecutor, after giving evidence, may remain in court to conduct the prosecution. I refer you for the doctrine and the case to 2d McArthur, p. 53, and app. 31. This, in the absence of uniform practice to the contrary, is the rule to be followed by our courts-martial.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

The Hon. A. P. UPSHUR,
Secretary of the Navy.

CONSTRUCTION OF THE MAISON ROUGE GRANT.

The error as to the date of a certain report of the Commissioner of the Land Office, embracing the Maison Rouge claim, set out in a confirmatory act of 29th April, 1816, (being December 4, 1812, when it should read December 14, 1812,) is not fatal to claims mentioned in the said report.

The construction of a statute is placed by the law in very much the same category as that of wills, and such erroneous recitals are susceptible of correction by parol evidence.

The "league square" is the extent of the satisfaction granted to claimants under the act of 29th of April, 1816; and, whatever may be the extent of the claim, this satisfaction may be had under the act.

OFFICE OF THE ATTORNEY GENERAL,

November 27, 1841.

SIR: Mr. Coxe's case, which you did me the honor to submit to me for my opinion, is thus stated: "The claim of Louis Boligny, under the Marquis de Maison Rouge, for 30 square leagues, is entered as No. 16 B, in the report of the commissioners, dated December 14, 1812, for the western district of Louisiana. (American State Papers, Public Lands, printed by D. Green, vol. 2, pp. 637 and 639.) By reference to the report of October 16, 1812, p. 617 of the same volume, it will be seen that the commissioners, in classifying claims, state that to the second class, comprising claims which, though not em-

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braced by the provisions of the said acts, (certain acts referred to in that report,) ought nevertheless, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages, and customs of the Spanish government, the letter **B** will be affixed.

“Daniel W. Coxe, esq., in the enclosed letter to me of the 23d instant, claims the confirmation of this claim to the extent of a league square, under the act of Congress approved the 29th of April, 1816. (Clark’s Comp. of Land Laws, p. 699, No. 290.) The original (in the Department of State) of the said confirmatory act of the 29th of April, 1816, refers, it seems, to the date of the Commissioner’s report as being the 4th of December, 1812, (not the 14th of December, 1812, the date of the report,) and provides as follows: That the claims marked **B**, described in the several classes in the above-mentioned reports of the commissioners for the western district of the State of Louisiana, (formerly Territory of Orleans,) and recommended by them for confirmation, be, and the same are hereby, confirmed: *Provided, nevertheless*, That under no one claim shall any person or persons be entitled, under this act, to more than the quantity contained in a league square. In this case the Solicitor of this office has made a report, (No. 322,) herewith transmitted, with the accompanying documents, Nos. 1, 2, 3, and 4. That officer’s opinion is to this effect: that the claim of Boligny, under the Marquis de Maison Rouge, by virtue of the said act of the 29th of April, 1816, for the reasons stated by the Solicitor, is void; that, by the terms of the said act, any claim above a square league is excluded; and that the act of the 29th of April, 1816, does not confirm claims in the report of the 14th of December, 1812.

“Commissioner Graham, in his letter of the 9th of February, 1826, (document 4, above referred to,) seems to have regarded the error in the confirmatory act, as to the date of the report, as fatal to the confirmation, and also to have considered that the act was designed (had the date been correct) to embrace such cases as are under a league square. After examination and due consideration of the case, in connexion with the Solicitor’s report, I gave a decision, in a letter of the 7th of August last, to Messrs. King and Wilson, that the error in

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the date was fatal to the confirmation. I inclined to the opinion then, and, on further reflection, am satisfied, that had not the error as to the date of the report existed in the confirmatory act, that act would have confirmed, to the extent of a league square, all claims marked B, exceeding that quantity, which are embraced in that report, and recommended for confirmation. In submitting Mr. Coxe's present application, before referred to, with the foregoing statement, I respectfully request the opinion of the Attorney General, and your instructions, for the government of this office, on the following points:

"1st. Whether or not the error as to the date of the report, (December 4, 1812, instead of December 14, 1812,) in the aforesaid confirmatory act of the 29th of April, 1816, is fatal to the confirmation of any claim embraced by the said report of the 14th of December, 1812?

"2d. If not fatal, whether or not the said act of the 29th of April, 1816, confirms, to the extent of a league square, the present and all claims exceeding that quantity, marked B, which are embraced in that report, and recommended for confirmation?"

To this statement the Commissioner, on my application to him, has added the following: "Pursuant to the request of Mr. D. W. Coxe, I have to state, that I know of no report from the commissioners of the western district of Louisiana, dated the 4th of December, 1812; that the report from the commissioners embracing the Maison Rouge, or Boligny claim, is dated the 14th of December, 1812. The recital in the act of the 29th of April, 1816, (Clark's Comp. Land Laws, p. 699, No. 290,) as regards the date of the report, is believed to be an error in stating or referring to the date of the report as being the 4th of December, 1812, instead of the 14th of December, 1812."

On this state of facts I have no doubt on either of the points submitted:

1st. The construction of a statute is placed by the law in very much the same category as that of wills, (3 Rep. 27, 6, Butler and Baker's case;) and such an erroneous recital in a will would clearly be susceptible of correction by parol evidence. In addition to this, I have the honor to refer you to

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the case of *Ross vs. Borland's lessee*, (1 Peters, 655,) in which the court ruled almost the very point in question here.

2d. The league square is the extent of the satisfaction granted to claimants under the act of the 29th of April, 1816; and I have no doubt that, in all cases, whatever the extent of the claim, this satisfaction may be had under the act. But I also think that it will be taken, and ought to be accepted, as a full satisfaction of the claim, be it what it may, so far, at any rate, as the Land Office is concerned.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Hon. W. FORWARD,

Secretary of the Treasury.

ATTACHMENT OF SEAMEN'S WAGES.

The Executive should not consent to place the government of the United States, which is not liable, without its special consent, to be questioned in its own courts, to be made compulsorily accountable, as stakeholder or garnishee, to its debtors, their assignees, or creditors—at least without a judicial decision to that effect by the highest tribunal known to the laws.

Payment of the mariners in Norfolk, by the purser of the United States ship Constitution, should be made, notwithstanding the attachment issued for their wages.

OFFICE OF THE ATTORNEY GENERAL,

November 29, 1841.

SIR: In answer to the question submitted to him verbally by the Secretary of the Navy, as to the pay of the mariners attached in Norfolk in the hands of Purser Buchanan, of the United States ship Constitution, the Attorney General has the honor to advise that the purser be instructed to pay the wages, notwithstanding the attachment, and the district attorney to decline the jurisdiction of the court, on behalf of the executive department, in any form he may judge most advisable. For this purpose, he is respectfully referred to the case of *Decatur vs. Paulding*, 14 Pet., 497, for a precedent to guide him. (Opinion of Attorney General Wirt—Published opinions, 458; *McCarthy vs. Gould*, 1 Ball & Beaty, 389; *Chealy vs. Brewer et al.*, 7 Mass. R., 259.)

The Navy Pension Fund.

The Attorney General has the honor to state, that he has repeatedly of late been called to consider attempts made to compel the executive officers of the government to settle accounts between the government and its officers and employes under the control of and according to rules prescribed for the courts of justice in their ordinary jurisdiction, and not according to those principles which experience has shown to be indispensable to prompt and efficient service of the country, and which, having been adopted by the Executive with a view to that service, cannot be interfered with by another department, without throwing the whole administration of public affairs into hopeless confusion. The Executive should not consent to place the government of the United States, which is not liable, without its special consent, to be questioned in its own courts, to be made compulsorily accountable, as stakeholder or garnishee, to its debtors, their assignees, or creditors—at least without a judicial decision to that effect of the highest tribunal known to the laws; none such, in the opinion of the Attorney General, has yet been pronounced.

Considered this 29th of November, 1841.

H. S. LEGARE.

Hon. A. P. UPSHUR,
Secretary of the Navy.

THE NAVY PENSION FUND.

The Secretary of the Navy has authority to transfer the bonds in which a part of the navy pension fund is invested.

OFFICE OF THE ATTORNEY GENERAL,
December 2, 1841.

SIR: In compliance with your request, I have devoted the first moment of leisure from paramount official duties to the consideration of the case of the transfer of the Cincinnati bonds to the navy pension fund, submitted to you by the Treasurer, Mr. Selden, in consequence of an application to that office by Mr. Elisha Riggs on the 1st of October last.

The ground on which the power of a late Secretary of the Navy to order the assignment in question is denied by the city

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council, not having been stated in any of the papers communicated to me, I can only say that I have in vain endeavored to conjecture what it can be. As the case comes before me it is this: The debtor of a trust fund denies the right of the trustee to change or alien the property of the *cestui que trust*. Now, whether the Secretary of the Navy be considered, as in *Decatur vs. Paulding* the court did consider him, as invested *qua talis* with executive discretion in regard to this fund, (14 Pet., 515,) or whether we regard him as the mere trustee of a charity, to be held to all the usual responsibilities of such a trustee in a court of chancery, I confess I do not perceive how his debtor-at law, whatever account the trustee himself may have to render to others in another form, has any authority to object to his doings, or sit in judgment upon them. By the act of 1832, the Secretary of the Navy is invested with all the powers conferred by the acts of 1799 and 1800 upon the commissioners over this fund. He is a trustee, and so as to all the world; but the *cestui que trust* has the legal ownership, and his power to alien the property of a charity, on reasonable causes, is now unquestionable. An absolute alienation, even of real estate, in England, by the trustees of a charity, is matter of common occurrence, and, if beneficial to the charity, entirely valid, even in a court of chancery, as between trustee and *cestui que trust*. On the whole, as at present advised, I see no ground to doubt that, in regard to third persons, the Secretary had a perfect right to order the transfer; and it is to be presumed, even in regard to the parties interested in the charity, that it was exercised with a sound discretion.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Hon. A. P. UPSHUR,

Secretary of the Navy.

MISSOURI LAND CLAIMS.

The confirmees under the treaty with France, under which their claims are asserted, do not claim the *dominium* of the civil law, but the doing of what is necessary to complete title and convey property. The lands to which they lay claim form a part of the public domain; and, although the United States acknowledge themselves bound to provide for them, the whole subject remains in contract.

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Specific performance of a contract for the sale of lands is an artificial rule altogether unknown to the common law.

The acts of 1824 and 1836, which confirm the French and Spanish grants, are not required to be carried into specific performance, if it cannot be done without unsettling titles in the country in question.

Congress doubtless legislated with a view to heal evils, of which an indiscriminate performance of the grants in question has been so prolific.

Congress reserved to itself, from the beginning, the power of executing the treaty in good faith, but with a sound discretion and due regard to the quiet of titles; and endeavored to reserve from sale and occupation all the lands subject to claim under foreign grants.

The act of 1836 is a legislative confirmation of all voidable locations under any law of the United States, or sales by the United States of any description whatever.

Prior confirmations, school sections, ordinary sales prior to the confirmatory act of July 4, 1836, and the New Madrid locations under the act of February 17, 1815, are valid as against the claim confirmed by the act of July 4, 1836.

The individuals who appeared as claimants before the commissioners, and who have obtained their favorable decision, are the persons who are to be recognised at the General Land Office as the confirmees under the act of 1836.

Claimants who have been interfered with by prior valid claims may locate the quantity taken from them by the interference in question on separate tracts, conforming to legal divisions and subdivisions of the same.

The power is sufficiently implied to authorize the issuing of patents for the portion of the confirmed private claims not interfered with by prior valid claims.

OFFICE OF THE ATTORNEY GENERAL,
December 7, 1841.

SIR: In compliance with the request which you did me the honor to make in your letter of 1st October last, I have availed myself of my earliest leisure to consider the matter of the Missouri land claims as stated in the letter of the Commissioner to you of the 21st September, and a sort of exhibit (marked A) that accompanied it. I will begin by observing that these papers are all that appear among those sent me in anything approaching the shape of a state of the case or cases on which my opinion is required. They amount to no more than the propounding, in the abstract, of certain general questions. The paper marked A, for instance, is in the words following: "As to private claims that have been duly filed, and which are entered in the first class of decisions of the late board of commissioners in Missouri under the acts of July 9, 1832, and March 2, 1833, for the final adjustment of private land claims in Missouri, and which claims are confirmed by the act of July

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4, 1836, confirming claims to land in the State of Missouri, and for other purposes, the following questions are respectfully submitted for the Attorney General's opinion and the instructions of the Hon. the Secretary of the Treasury, for the guidance of the General Land Office in its definite action on the said claims. Are the following classes of claims, or either of them, valid or not as against the claims confirmed by the act of July 4, above mentioned, viz:

"1. Prior confirmations.

"2. School sections.

"3. Ordinary sales prior to the said confirmatory act of July 4, 1836.

"4. New Madrid locations under the act of February 17, 1815. (Land Laws, p. 667, c. 248.)

"5. Is the individual who, according to the report, presented the claim before the board as the assignee or legal representative of the original grantee, to be recognised as the confirmee, or is the original grantee to be regarded as the confirmee?

"6. Must the claimant, whose claim may be interfered with by prior valid claims, be confined, in making his location of the amount or quantity of such interference, to such legal subdivisions of the public lands as will, together, form one body or tract of land, or may he locate the quantity or amount of such interference on separate tracts, conforming to legal divisions and subdivisions, at one time, and within one and the same district, or can the claimant be allowed to take part of his new location in one district and part in another?

"7. 'The remaining question: Is the power sufficiently implied to authorize the issuing of patents for the portion of the confirmed private claim not interfered with, or must further legislation be awaited on this point?'

I do not dissemble the reluctance which I feel, as every practical lawyer must feel, to deal with abstract or speculative questions. I need not say that the courts will never consent to touch them. There is always more or less of uncertainty in answers which must be hypothetically given; and it not unfrequently occurs that, after bestowing the most elaborate attention upon some one or more aspects of a case, the counsellor finds, to his mortification, that the true question at issue does not happen to have occurred to him among the many examined.

What makes my task more difficult in the present instance is that, on the face of the papers sent me, it is apparent that there has been, for twenty years past, great conflict of opinion, and the most active discussion and litigation, on all the points involved. I perceive not only that Solicitors and Commissioners of the Land Office have written long opinions upon them, but that no less than three of my predecessors have been successively consulted. One of them regarded the difficulties as susceptible of no solution but by a special act of Congress. In the face of all this acknowledged doubt and perplexity, I am now called upon to review their judgments, and to pronounce one myself, which may, after all, only increase the litigious matter in the premises, to be laid before some successor of my own. However, I will, to the best of my abilities, endeavor to meet and to solve the difficulties that embarrass the department. At least it is entitled to my opinion, and I am bound to give it as it is, right or wrong.

To begin with a general view of the nature of the claims under the treaty with France, which is the origin of the whole discussion. In the first place it is to be remarked, that the confirmees under the treaty claim, not property strictly so called, or the *dominium* of the civil law, but the doing of what is necessary to complete *title*, and to convey property. The lands to which they lay claim, form still (where patents have not been granted) a part of the public domain of the United States; and, although the United States acknowledge themselves bound to provide for those claims, still the whole subject is in contract, and their rights are only *jura ad rem* under treaty with a foreign government. This distinction is nowise important with a view to the question whether those rights shall or shall not be held sacred; but it is very important, with a view to the question, *how* they are to be satisfied, *how* they are to be regarded by courts of justice, *how* they have been affected by federal legislation, *how* they stand when they come in conflict with the rights of others, who, with equal equity, happen to have the advantage of an equally vested legal estate. It is obviously very important to the great question that would arise between individuals, whether they may vindicate, in the language of the civilians—that is, insist on having the specific

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thing, as described in their grant—or shall be allowed only damages, amounting to full indemnity for the breach of the contract.

By the law of nations, which binds sovereigns, it is extremely doubtful, according to the opinions of the first jurists of the times, whether there be any redress for any breach of contract but in damages. Accustomed as we are to the proceedings of our courts of chancery, which enforce, in cases of a peculiar character, and by the exercise of an extraordinary jurisdiction, specific performance of a contract for the sale of lands, we forget that this is an artificial rule, altogether unknown to the common law. At any rate, this is the view, in my opinion, which Congress took of its own responsibilities under the treaty of 1803. And the interpretation of treaties, as well as the manner of fulfilling them, being as against the government, (a matter properly of political cognizance,) this office and yours are bound by the will of Congress in the premises. This is familiar doctrine in courts of prize. It does not, in the least, signify to us whether or no, by the law of nations, Congress was bound to confirm specifically the grants it acknowledges to be binding on its conscience. The question for us is, what did Congress think of its own obligations in this particular; and how has it seen fit to perform them? Did it mean specific performance, or compensation and indemnity only? It was a question for their sovereign (for so in the case it was) determination; and their *sic volo* is conclusive for us. I think their conduct defensible and fair; but that has nothing to do with the subject, or my legal judgment upon it. Take the analogy of the Florida treaty, as to which I gave you an opinion some weeks ago. By one of its stipulations, this government was bound to make compensation for injuries admitted to have been done by its troops in 1812, and to submit the alleged injuries in every case to examination, according to the usual course of the judicial authorities. Yet Congress, when it came to legislate upon the subject, with a view to its ultimate responsibility in regard to it, orders the Secretary of the Treasury to pay not all the awards of the court in Florida, but only such as he should deem just. Clearly, you have no authority to go any further towards fulfilling the treaty than

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you are allowed under this strict precept, as I then had the honor to advise you. And so it is in my judgment with regard to the Spanish and French grants in question. It seems to me very clear that both the act of 1824 and that of 1836 mean that no confirmation made by virtue of them shall be carried into specific performance, if this cannot be done without unsettling titles in the country in question. Neither the two acts, nor all the parts of each, can be read together in any other way. The exception in the act of 1836, section 2, is of lands previously located under any law of the United States, or surveyed and sold by the United States. In the act of 1824, the words are still more comprehensive. They cover all locations made, (to which there exists not some incurable objection, distinct from those claims, of which bye-and-bye,) and all sales susceptible of confirmation by an act of Congress. To say that this exception does not protect those whose locations cover the lands subject to the claims confirmed by those acts, because those lands had been reserved in the act of 1811, section 6, and were not subject to location or sale, is to make the exception a solecism in terms. It would be to except what was not excepted, which were absurd; and so the argument proves too much. If locations made under law mean lawful locations, and sales mean valid sales, there could be none such, according to this showing itself, on lands reserved by a permanent act (1811) from sale or location. But the exception, in my opinion, is not nugatory. On the contrary, the facts disclosed on the face of these papers, and the fierce and strenuous litigation that has already sprung out of some of the claims, show that it was a wise and beneficent provision of the legislature. If ever a slight deviation from the rigor of abstract principle was justified (as the history of our law shows it has been so often defended) by the argument *ab inconvenienti* against shaking titles taken on mistakes of fact, or a mistaken view of the law, it was in this case. I have no doubt at all that Congress did legislate with a view to heal these evils, of which an indiscriminate specific performance of the grant in question would, as appears from the papers before me, have been so prolific. This is the great principle binding upon your department, from which I set out, and on which I bottom all

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my conclusions on this subject. It will be quite apparent, from all the acts taken *in pari materia*, that Congress reserved to itself, from the beginning, the power of doing just what I take it to have done—namely, to execute the treaty in good faith, but with a sound discretion and due regard to the quiet of titles. The result of the whole is, that it endeavored, as far as possible, to reserve from sale and occupation all the lands subject to claim under foreign grants, but yet took care that, in the complexity and uncertainty of the whole subject, and the difficulty as well as the delay inseparable from the adjusting of so many titles, real or pretended—some, perhaps all of them, standing in the way of the rapid progress of population and improvement in the west—the commonwealth should suffer no detriment. It prevented, as far as it might—that is, it forbade the sale and occupation of such lands; yet knowing that, after all, they had not been prevented, finally acquiesced in an inevitable abuse. It accordingly kept the control of the whole subject in its own hands, and at last settled, or rather precluded, controversies that would otherwise have sprung up, by fulfilling the treaty, under what I consider as very reasonable and wholesome qualifications, with a view to titles voidable indeed, and even void as against itself, but which could not be declared so without infinite mischief. Thus, in the act of 3d March, 1811, section 6, in the very clause so much insisted on by the advocates of the confirmees, it is provided “that, till after the final decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has, in due time, and according to law, been presented to the register of the land office, and filed in his office, for the purpose of being investigated,” &c.

So by the act of 13th June, 1812, for settling claims in Missouri, section 8, it is enacted that the recorder of land titles shall have the same powers, &c., in relation to claims filed, as the former commissioners, except that “all his decisions shall be subject to the revision of Congress.” By the act of 9th July, 1832, section 3, it is enacted that lands contained in the first class (such as would have been confirmed by Spain, &c.) shall continue to be reserved from sale as heretofore, until the decision of Congress shall be made thereon. It is clear,

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therefore, that Congress never meant to be bound absolutely by any award of the recorder and commissioners, but to do what should seem to itself agreeable to equity and reason on a full and final survey of the whole subject. Accordingly, its final decision was pronounced by the act of 1836, and that act conforms to the view here presented of its purpose, and is in my opinion inconsistent with any other. But, as I have said, in the previous act of 1824 it had taken the same precautions. By that time it began to be apparent that the reservations made in the act of 1811 had been, as from the facts before me it manifestly was, neglected in practice. In 1815 the act authorizing the New Madrid locations had been passed, and those locations, although in strict law not authorized on lands subject to French and Spanish claims, had in fact been made upon such in very many instances. It was, indeed, almost inevitable they should be. Many of these claims were, it seems, so indefinite, that the lands called for by them could not without much difficulty be identified. Many of them were spurious, or sustained by no proof; and being finally rejected, the soil claimed fell back into the mass of the public domain. There was great delay in presenting and establishing others, &c. Under such circumstances many titles had been acquired, many patents issued, and improvements made, without due regard to the ultimate (and which was no doubt considered as the remote) possibility of ouster under these claims. We all know how impossible it is for the government to stay, or even regulate, the eager rush of our people into the new lands. It accordingly did in that case what it has been over and over again constrained to do as against itself by its pre-emption laws; it sanctioned what it could not prevent, and made compensation to the claimant under a treaty with a foreign government which it could no more execute literally, than it could its own laws with regard to the sale of its domain.

I say claims under a treaty—claims against itself as a government—claims which no court has any right to enforce, and which bind Congress only in conscience, and bind the other departments only so far as Congress has been pleased to acknowledge them. For although by referring these claims to the decision of a district court, with an appeal to the Supreme

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Court of the United States, they are made to a certain intent judicial questions, yet it is only so far as regards their validity as claims, or *jura ad rem*. The inquiry, is this a good and valid, or a false and groundless claim? is, under these acts, to be answered by the courts; but the subsequent question, supposing it to be the former—how shall it be executed?—is one which, under the acts of 1824 and 1836, (read together,) Congress has, in my opinion, in all cases within the exception referred to above, reserved for its own decision, and in regard to which it has decided, that the execution shall be by an equivalent in land. To say that Congress, having granted once by the treaty, has no power to make a second grant, is to mistake a claim to land protected by a treaty with a foreigner for a title actually vested in a citizen under the constitution of the United States, which are in my judgment two very distinct things. At all events, as far as the powers of the executive department are concerned, the acts of Congress in this particular are conclusive upon it.

The act of 1836, according to this view of it, is a legislative confirmation of all voidable locations made under any law of the United States, or sale by the United States, of any description whatever. I see no restriction or qualification in the act; and since its very object is, as I have shown, to give validity to these sales and locations in spite of one fatal objection, (that the lands subject to these claims were not *in commercio*,) I see no reason why it should not be interpreted as curing all other defects which are susceptible of being cured by an act of Congress. The words of the law are as large as the purview thus ascribed to it, certainly, and Congress had the power and the right to pass it just in that shape; and I will add, in my judgment acted wisely in doing so.

Put the strongest case of those stated—those of the New Madrid locations. Certainly Mr. Wirt (*Opinions, &c.*, vol. 2, page 14) pronounced them void, when made on lands not subject to sale—lands, for instance, not surveyed, or lands expressly reserved from sale. But then the same learned lawyer admits in the same place, (as indeed who could deny?) that the defect might be cured by act of Congress. Now it is my opinion that the act of 1836 does cure defects in such locations, which fall within the words “lands located under a

law of the United States"—namely, the express provision of the act of 1815—and that not quite gratuitously, for the titles of their former lands (injured by the earthquake) were to be surrendered or conveyed to the United States.

In short, sales or locations which, under the general land law, would be held void by the executive department of the government, are simply voidable in regard to Congress, and may at any time be rendered valid by its acts, provided only, as in the case before me, it has done nothing that amounts to a complete alienation to others. On the whole, I am of the opinion, that all the four first classes of cases stated above are valid, as against the claim confirmed by the act of the 4th of July, 1836.

I need not say that I deliver this opinion with the hesitation and diffidence naturally inspired by the difficulties of a subject that has perplexed so many abler, and in these matters more experienced minds, and that I am aware some of the positions here maintained may seem to conflict with *obiter dicta* of the courts; but I see no other conclusion that conforms more to what appears to me the scope and objects of the acts of Congress, as well as to the established principles of the law. The other three questions, though of minor importance, are not without their difficulties.

5. To the fifth question, I feel myself constrained by the judgment of the court, (very questionable if received in its whole extent,) in *Strother vs. Lucas*, (12 Peters,) to answer, with my predecessor, Mr. Butler, "that the individuals who appeared as claimants before the commissioners, and have obtained their favorable decision, are the persons who are to be recognised at the General Land Office as the confirmees under the act of 1836." That I may not be misunderstood, however, I have no hesitation in saying, that, in my own private opinion, no commission, &c., to adjust claims under a treaty or convention with a foreign nation, can, in the absence of express authority to entertain adversary suits between different claimants, be considered as empowered to do anything more than determine whether the claim itself, without regard to the actual claimant, is valid as against the government.

I believe the very last decree given by Lord Eldon was to this effect, in regard to an indemnity convention with France.

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6. I see nothing in the statute to prevent the claimants locating the quantity taken from them by the interference in question in separate tracts, conforming to legal divisions and subdivisions, which is the only restriction expressed. The argument *ab inconvenienti* against this conclusion is very strong; but then it must be remembered that, according to previous reasonings, the case of these claimants is one in which Congress, having postponed their rights under the treaty, literally interpreted, to the equities of others and the policy of society, might very well be expected to show certain liberality in the equivalent it offered.

7. *Strother vs. Lucas* decides, as Mr. Butler remarks, this question, too, against the necessity of issuing patents for the portions of the confirmed grants not interfered with. Yet, were it not for the word "titles" in the act of 1836, I should hold that patents were necessary—the confirmation being, by the supposition of mere inchoate titles, under the Spanish or French grants. At all events, since this is a question of a practical character, and to be governed very much by the course of the Land Office, I see no very conclusive reason against issuing the patents in question. If superfluous, they can do no harm; if not, they ought to be issued in execution of the treaty. But, in that case, I should hold any claimant, who accepted a patent for less than his claim, with an equivalent elsewhere, as forever estopped as against the United States and its privies. I have thus given to you the best judgment which I have been able to form, upon this very difficult and complicated case—a good deal of which difficulty and complication, however, in my opinion, belongs not so much to the questions involved as to the manner in which they have been treated by others—and I can only add that, should it not be satisfactory to you, I see no remedy or recourse but in a special act of Congress declaratory of its own purposes, or in some solemn judicial decision precisely upon the points here insisted on in behalf of the government.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

HON. W. FORWARD,

Secretary of the Treasury.

Accounts for Removing Cherokees, and Accounting Officers.

ACCOUNTS FOR REMOVING CHEROKEES, AND ACCOUNTING OFFICERS.

The accounting officers have authority to reconsider a matter that had passed from the executive department to the legislative, under and pursuant to the act of March 3, 1841, chapter 18, section 2.

They are directed to settle and adjust the accounts of the claimants under a contract alleged to have been made on the 12th June, 1838, for subsisting and emigrating the Cherokee Indians, upon principles of equity and justice; but, in settling them, the contract of the claimants with the United States of the 27th June, 1838, must be taken into consideration.

There are no obligations resting upon the government to indemnify claimants for an amount of provisions beyond what might be necessary for furnishing six thousand Indians during the probable period of their journey.

The number of Indians to emigrate being left indefinite in the contract itself, making a case of latent ambiguity, parol evidence is admissible to show what the contract really was.

The contractors are entitled, in strict law, to the difference between the contract price of the provisions they were bound to furnish and the actual value or market price of them in the country where they were to be supplied; but, by the act of March 3, 1841, the accounting officers are bound to call for proof that the provisions were actually procured to be furnished, and loss on them actually sustained, before making any allowance whatever.

The act of March 3, 1841, which is a positive enactment specially applicable to the case, so far alters the common rule upon the subject of damages for breach of an executory contract, as to supersede that rule, and must govern the department.

OFFICE OF THE ATTORNEY GENERAL,

December 8, 1841.

SIR: I have considered the case of Clements, Bryan, & Co., as presented to me on the state of it, furnished by the Second Comptroller, and communicated to me in the letter I had the honor to receive from you yesterday. The authority to reconsider a matter that had passed from the executive department to the legislative is conferred upon the accounting officers by the act of March 3, 1841, chapter 18, section 2. Those officers are directed "to settle and adjust the account of the claimants arising under a contract alleged to have been made on the 12th June, 1838, for subsisting and emigrating Cherokee Indians," upon principles of equity and justice; with this important *proviso*, "that, in settling said accounts, said accounting officers shall also take into consideration the contract of the claimants with the United States of the 27th June, 1838, and

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deduct any profits which they may have made under the said last mentioned contract from whatever amount may be found due them under the said contract of June 12."

On the face of the act, three things are very apparent: 1st. That Congress had no intention of ratifying the pretended contract of the claimants with Page, without reserve or qualification, as is so confidently urged on their behalf; but, treating it expressly as an "alleged" contract, referred it to the accounting officers to determine what was, upon the whole matter, the liability of the government. 2d. That they meant this decision to be made according to the principles of equity and justice, as contradistinguished from the strict technical rule of law; or, what is the same thing in other words, they invested the accounting officers in the premises with that large discretion which juries have always been allowed to exercise in actions sounding in damages, even when they arise *ex contractu*. 3d. They not only meant that those officers should be governed by the general rules of equity and discretion which govern the estimation of damages in ordinary cases, so as to adjust them as precisely as possible to the nature and degree of the injury done to the party complaining, and to give him a complete indemnity or *restitutio in integrum*, and nothing more; but they took pains to preclude all doubt, by expressly directing that the contracts of the 12th and the 27th of June should be considered together as one transaction; and that, so far as they might fairly be considered as one, whatever loss was pretended on the first, should be compensated by the gain on the last. I shall presently point out the qualification with which this remark is to be received and applied. But in the mean time I would observe upon the claim, as it is stated by the Comptroller, that it is, on the showing of the complainants themselves, an unconscionable one, and such as, were there no legal objection to it, (as there are several,) would not be enforced by a jury, nor aided by a court of equity. The case is this: government, by its agent, admitting what is not so, for the sake of the argument, contracted, with a view to the fulfilment of a great public duty, (the removal of a whole tribe of Indians,) that provisions should be furnished for their comfortable transportation. Just six days after this contract—made to do what

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it is confessed, nay urged and insisted on by the claimants themselves, would require a considerable period of time, and many successive supplies of provisions, &c., to accomplish, and before any important preparations (supposing them not already made) could have been set on foot, even for a partial performance on the part of the contractors—the government, moved by considerations both of mercy and policy, determined to change their plans so as to render them more acceptable to the unfortunate people who were about to be sent away from their homes. The consequence of this change of plan—thus reasonable, just, and necessary in itself, and having everything to recommend it to the approbation of all good men—was, that the services of the contractors, to the extent they allege to have been at first in contemplation, were no longer needed. The contractors had immediate notice of the unavoidable change of policy. Now, is it consistent with equity and good conscience, that, without any allegation of actual loss, these claimants should demand at the hands of the government all they would have received, had the original design been accomplished, and be paid not only their possible gains on what they might have furnished, but the full value of every thing they did not furnish? On the contrary, I am quite clear that there never were circumstances which better entitled a defendant to the indulgent consideration of his judges. Even in a court of law, in a case so circumstanced, a plaintiff would not be allowed more than indemnity. It is full as strong as the old leading one of *Jones vs. Morgan*, reported in Keble, 569, and Lev. III, of an agreement to pay for a horse, a barley-corn, a nail—doubling on each successive nail, so that, there being thirty-two, it came, in all, to five hundred quarters. The court directed the jury to give as damages the value of the horse: they did so, and it was held good, and has been received as law ever since, in the assessment of damages by juries in cases recommended to their favor by peculiar circumstances. This, too, was not a mere executory contract. As to the idea referred to by the Comptroller, that the claimants are to be paid for all the beef and corn they might have furnished, under their pretended contract with Captain Page, without being charged with the value of them, it is of course too extravagant to be

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entertained. Were the government, after having settled this account, to institute an action for these objects, it might well be reminded by the courts that it had made a voluntary payment of what was not due, with the remedy in its own hands, and would have no right to count on their aid in relieving itself from the effects of its own negligence by circuitry of action.

After looking into the facts of this case, as far as I could gather them from a statement of the Comptroller and the two papers addressed to him by the Second Auditor, I have no doubt—1st. That Captain Page had no authority whatever to bind the government beyond the amount necessary for furnishing 6,000 Indians with provisions during the probable period of the journey, and that there can be no obligations upon it, in justice or equity, to indemnify the claimant for any amount of provisions, &c., beyond what might be necessary for that purpose. 2d. That, consequently, there is no ground to pretend that government is estopped, by the deposition of Captain Page, to show what the contract really was, but may resort to any other evidence; especially, as the number of Indians to emigrate being left altogether indefinite in the contract itself, it was a case of latent ambiguity; and parol evidence would have been admissible between individuals *a fortiori* in a case which, for various reasons, does not fall within the scope of a rule of evidence founded on motives of general policy—being that of a government not subject to jurisdiction, consenting *ex gratia* to pay a claim if established on equitable principles. As to the pretended ratification of the superintendent, it would be liable, if it had exceeded his instructions, to the same radical objection of want of authority; but, in truth, it cannot, by any fair interpretation, be extended beyond the limits which he had himself so positively fixed, and to which, of course, he must be intended to have referred. It would be a captious and injurious construction of a mere general approval to stretch it further. 3d. That the contractors are, for the breach or rescission of that contract, entitled, in strict law, to the difference between the contract price of the provisions they were bound to furnish to 6,000 Indians, and the actual value or market price of them in the country where they were to be supplied at the time they were to be supplied. But it is, as I have

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said, a rule universally applicable to all actions sounding in damages, that juries are allowed great discretion in mitigating these, even when they spring out of a breach of contract, so as to restrict them in amount to a fair indemnity; and I think, under the words of the act of 3d March last, the accounting officers would be bound to call for proof that the provisions were actually procured to be furnished, and loss on them actually sustained, before they could make any allowance whatever for them.

Supposing them, however, satisfied that damages were incurred by the claimants, these must be repaired, so far as they were the necessary or direct and natural consequences of the breach of contract, but no distant or collateral ones merely. At least, this would be the conclusion of law, were it not for, 4th, the act of 3d March, which is a positive enactment, specially applicable to the case, and, so far as it alters the common rule upon the subject of damages for breach of an executory contract, supersedes that rule, and must govern the department. Then the question is, how far does it modify the rule, or does it modify it at all? The Comptroller applies the statute literally; but if the literal construction be unreasonable, and, above all, if it work injustice, the words must be taken with equity, or rather with a particular reference to the true subject-matter. Congress evidently meant that the second contract should, so far as it was identical with the first, stand in the place of the first; and if the damages sustained under the first were compensated by the gains under the second, there should be no allowance made on account of the breach of the first. Congress evidently intended, also, to grant some relief, if any were found due in equity and justice. If the contracts were for identically the same amount of provisions, &c., they would, excepting, perhaps, some trifling damage sustained during the interval, cancel each other. If the first were for a greater amount than the second, the latter would operate as satisfaction *pro tanto*. But, from the statement of the Second Auditor, it should seem that the supplies furnished under the second contract were double those admitted as necessary under the first for the support of 6,000 Indians during the journey. And then

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the question is, are the accounting officers to set off the profits made on the whole of the last contract, against the damages alleged to have been sustained by breach of the first? Let us state it more strongly: Suppose the first contract had been for furnishing 100,000 pounds of butchers' meat, at 10 cents, and, in consequence of the breach, this butchers' meat having been actually prepared, had been sold for 5 cents. The measure of damages, in strict law, and, indeed, in such a case in equity, too, would be just the difference of \$100,000 multiplied by 10, and the same sum multiplied by 5—i. e., \$5,000. Congress orders this difference to be adjusted on principles of equity, and in such a case it would be bound to pay \$5,000. But the government having made a new contract a few days after the rescission of the first, and agreed itself to become the purchaser, at a profit to the contractor, of the very same provisions, to the same amount, orders the difference supposed above to be adjusted, not in reference to the market price, but to the price it has itself *actually paid*; and if that price be equal, or nearly equal, to the contract price, of course the difference, and the damage with it, disappears, or is diminished *pro tanto*. In the case of equality between the amounts contracted for in the two transactions, there is no difficulty. But suppose the fact to be, (as it seems it is,) that the second contract is more extensive than the first. Put the case, that, instead of 100,000, it was for 1,000,000 pounds butchers' meat, at the same, 10 cents a pound, (equal to \$100,000,) and the difference between the contract price and the market price is again 5—\$50,000. If the accounting officers were, under this statement, to deduct all the profits on the last, by way of making amends for the breach of the first, it is plain that the claimants, instead of being relieved to the extent of their damages, (\$5,000,) would lose that sum, and \$45,000 besides—that is, all their profits under the second contract. But this is absurd. Yet, I admit, the words are very strong and express in favor of it.

The construction I put upon the act makes it sensible and just, and reconciles it with the view which the Comptroller takes, (and which I fully concur in,) with regard to the limits of the responsibility incurred by the government under the first

Further Explanation of the Maison Rouge Grant.

contract. Should it, however, not be satisfactory to you, there is no remedy but in a declaratory act of Congress.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Hon. JOHN C. SPENCER,

Secretary of War.

FURTHER EXPLANATION OF THE MAISON ROUGE GRANT.

Congress has given to the Land Office authority, and has prescribed to it as a duty, to treat claims made under the treaty as valid up to the extent of a league square, and no more.

The claim to all beyond a league square is unconfirmed, and stands, in every respect, as if the act of Congress had not been passed, except that the fact, that Congress has refused to acknowledge it further, has the effect to raise a presumption that Congress, by a partial confirmation, did not mean to admit the justice of the claim, but only to buy its peace; and that the executive department must regard the claim, whatever may be its extent, as satisfied by the acceptance of a league square.

OFFICE OF THE ATTORNEY GENERAL,

December 22, 1841.

SIR: In reply to the inquiry of the Commissioner of the General Land Office, as to the true construction of my opinion of the 27th ultimo, I have the honor to restate it more at length, and more explicitly. I conceive that Congress did not mean to confirm the claims in class B, under the acts of 1807 and 1816, absolutely. The legislature, for reasons satisfactory to itself, and according to principles which I had the honor to develop more fully in a recent communication to you on the subject of the Missouri land titles, chose to acknowledge those claims only *sub modo*, and to a limited extent. ITS WILL IS OUR LAW. It has given the Land Office authority, and has prescribed to it as a duty, to treat each and every claim recommended for confirmation in class B as valid up to the extent of a league square, but not beyond. The claim to all beyond a league square is unconfirmed, and stands, in every respect, as if the act had not been passed, except that the fact, that Congress has refused to acknowledge it further, has these two effects: 1st, to raise a presumption that Congress, by a partial

 Violation of Neutrality and Act of Congress of 1818.

confirmation, did not mean to admit the justice of the claim, but only to buy its peace; 2d, that, at any rate, the executive department must regard the claim, whatever may be its extent, as satisfied by the acceptance of a league square. Mr. Coxe has a title to a vast extent of country, it appears; to the whole of which, he says, it is as just and valid as to any one league of it. This may or may not be so; but it is certain that to the Land Office the whole of that title, whether designated by metes and bounds, by quantity, or as black acre or white acre, is good only for a league; and that league ought not, I think, to be granted without it distinctly appearing of record that the claimant representing such or such a claim for so many acres, or of such a description, has received satisfaction under the law of 1816, which the Land Office, in granting him a league square, is carrying into effect—I mean, that his claim as a claim, as the law now stands, and so far as the executive department is concerned, will be at an end, and that he, or his assignees, will have no further right or demand to make under the act of 1816. That must be understood, and must be recorded for the information of all concerned. Of course I do not undertake to bind Mr. Coxe not to seek the satisfaction of the rest of his demand, whatever it may be, either in law or equity, from Congress, or in the courts, should they, as he seems to imagine they will, think themselves authorized to give the redress he seeks. But the executive department can recognise his whole claim as only for a league; and, having given him that, must treat it to all intents and purposes as satisfied and settled.

I have the honor to be, sir, your obedient servant,

H. S. LEGARÉ.

Hon. W. FORWARD,

Secretary of the Treasury.

 VIOLATION OF NEUTRALITY AND ACT OF CONGRESS OF 1818.

The building of two schooners of war in New York for the Mexican government, and being about to be furnished with guns and the usual military equipment, is clearly within the 3d section of the act of 1818.

Violation of Neutrality and Act of Congress of 1818.

These vessels having been built expressly for the service of Mexico, which is waging war against Texas, the persons are liable to the penalties of the act, and the vessels to forfeiture.

The policy of this country is, and ever has been, perfect neutrality and non-interference in the quarrels of other nations.

OFFICE OF THE ATTORNEY GENERAL,
December 29, 1841.

SIR: I have had the honor to receive your note of yesterday enclosing a letter from Mr. Curtis, collector of New York, on the subject of two vessels of war built and fitted out in New York for the Mexican service. Assuming the facts to be (as they are stated by Mr. Curtis) that the vessels in question are two schooners of war; that they have been built for the Mexican government, and that they are about to be furnished with guns and the usual military equipment, I have no hesitation in saying that it presents a case clearly within the act of 1818, not only within the tenth section referred to by that gentleman, but within the third section. By the eleventh section, the collector is authorized to take a bond, &c., where he sees probable cause to suspect that a vessel, manifestly built for warlike purposes, is intended to be employed by the owner to cruise or commit hostilities upon the subjects, citizens, or property of any nation, or of any colony, district, or people, with which the United States are at peace. In this case, it is not probable merely, but certain, that the vessels-of-war in question are destined to be so employed. They have been built, it seems, expressly for the service of Mexico, a power actually waging war against Texas, which is a country not only falling within the very comprehensive words of the enactment, but recognised as an independent State by the government of the United States.

The third section of the act is express: "That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince, or State, &c., to cruise, &c., (as above,) he shall be deemed guilty of a high misdemeanor, and shall be

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fined not more than \$10,000 and imprisoned not more than three years; and every such ship, with her tackle, &c., together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited."

If there had never been a judicial exposition of this statute, I should think it too clear for argument that, on the state of facts assumed here, the case falls within the section just recited. But the Supreme Court has repeatedly, and in one instance with particular reference to the act of 1818, laid down principles that preclude the possibility of a question in regard to its meaning. I refer you to 9 Cranch, 364, the *Alerta*; and 4 Wheaton, 309, the *Estrella*.

The reasoning on this subject is shortly this: The policy of this country is, and ever has been, perfect neutrality and non-interference in the quarrels of others; but, by the law of nations that neutrality may, in the matter of furnishing military supplies, be preserved by two opposite systems, viz:—either by furnishing both parties with perfect impartiality or by furnishing *neither*. For the former branch of the alternative, it is superfluous to cite the language of publicists, which is express, and is doubtless familiar to you. If you sell a ship-of-war to one belligerent, the other has no right to complain so long as you offer him the same facility. The law of nations allows him, it is true, to confiscate the vessel as contraband of war if he take her on the high seas; but he has no ground of quarrel with you for furnishing, or attempting to furnish it. But, with a full knowledge of this undoubted right of neutrals, this country has seen fit, with regard to ships-of-war, to adopt the other branch of the alternative—less profitable with a view to commerce, but more favorable to the preservation of a state of really pacific feeling within her borders—she has forbidden all furnishing of them under severe penalties. The memorable act of 1794 consecrated this policy at an early period of our federal history; and that act was only repealed in 1818 to give place to an equally decided expression of the legislative will to the same effect. Whatever may be thought of the spirit and policy of the law, its scope and objects are too clear to be misunderstood; and I am of opinion that the case stated by Mr.

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Curtis falls fully within the purview of the third section. But, I repeat it, this opinion is hypothetical. I assume that the parties built and equipped these vessels expressly for the service of Mexico, knowing her to be a belligerent; and I presume the intent from the fact.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

HON. WALTER FORWARD,

Secretary of the Treasury.

VIOLATION OF NEUTRALITY AND ACT OF CONGRESS OF 1818.

The foregoing opinion is reconsidered on the statement that the vessels were not delivered, nor the property changed, within our jurisdiction; but were sent out of port under control of our own citizens unarmed, and that every possible precaution has been taken to insure pacific conduct upon the high seas. The doctrine is reaffirmed, but it does not as fully apply to the case now presented as was supposed from the first statement of the case.

Nevertheless, although the sale is made abroad, if the vessels were equipped by American citizens within the United States for belligerent purposes, and for a nation belligerent to another with which ours is at peace, knowing the purposes for which they are to be employed, it is insisted that the equipping is repugnant to the law of 1818.

All trading with a belligerent in ships-of-war already equipped for service is repugnant to the settled policy of the United States, and to the solemn declaration of Congress in the act of 1818.

For, however popular opinion may have changed on so important a subject, the act of 1818, like that of 1794, was intended to secure, beyond all risk of violation, the neutral and pacific policy which they consecrate as our fundamental law.

The taking of a bond is recommended in this case under the 10th section of the act of Congress; yet all equipping within our jurisdiction of vessels of war for a belligerent, by an American citizen, knowing the purposes for which they are to be employed, is unlawful.

OFFICE OF THE ATTORNEY GENERAL,

January 8, 1842.

SIR: I have had the honor to receive your letter of this morning, enclosing one from Mr. Curtis, another from Mr. Hoffman, and some of the correspondence of the parties concerned; and submitting again for my consideration the case of the schooners of war built for the service of Mexico. I deeply regret that both my former and my present opinion have been

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called for at a moment when, owing to the extraordinary pressure of occupation incident to the opening of the Supreme Court, in which I have a heavy calendar, on Monday next, I am unable to give to the subject that full and mature consideration to which its importance undoubtedly entitles it. I need not, I am sure, remind you of the circumstances which have hitherto prevented my making at an earlier period the necessary preparation for arguing the government cases before that tribunal. You will, therefore, appreciate the disadvantages under which I now comply with your request as to the matter in hand.

The statement of facts presented to me in the papers before me is essentially different from the case in which my first opinion was bottomed. The letter of Mr. Curtis, formerly transmitted to me, having no reference to the possibility of an application of the 3d section of the statute of 1818, was very brief and general; accordingly, as I stated to you in my former letter on this subject, I spoke hypothetically. I supposed the vessels in question to have been built and equipped for war, expressly for the Mexican service, and to have been delivered, or to be about to be placed under the control of that government in the harbor of New York. I cannot bring myself to doubt that such a case would fall within the purview of the statute; and, lest any thing that may be said or done on this occasion may be drawn into precedent the other way, I repeat that, in my opinion, the plain scope and object of the law is to prevent all equipping of vessels of war in our ports for a foreign power actually engaged in hostilities with a nation with which the United States are at peace, wherever the property is changed, and the control of the vessel given to the belligerent. The case is (as Judge Johnson said in that of the *Bello Corrunes*, 6 Wheat.) not without difficulties, certainly, and it is a new one. No judicial decision precisely upon the point has ever been made. The case of the *United States vs. Quincy*, (6 Pet.) went off on the purpose for which the privateer was equipped. When, in my former letter to you, I referred to the case of the *Alerta*, (9 Cranch) and the *Estrella*, (4 Wheaton) I confined my remarks to the principles laid down in them. Mr. Hoffman supposes I cited them as precedents. Not so. I

vouched them for doctrine; and I have no doubt that the reasoning of the court leads inevitably to the conclusion to which I have been brought by it.

The United States, says Livingston, J., in delivering its judgment, (p. 309,) instead of opening their ports to all the contending parties, when at peace themselves, (as may be done when not prevented by antecedent treaties,) have always though it the wisest and safest course to interdict them all from fitting out or furnishing vessels of war within their limits; and to punish those who may contribute to such equipments. To enforce a general and strict observance of this neutrality, on the part of our own citizens, and of others who reside among us, a law passed as early as 1794, making it penal for any one within the jurisdiction of the United States to enlist, &c. The same doctrine has been held in the case of the *Alerta*, (9 Cranch, 365.) "A neutral nation," said Washington, J., "may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels-of-war within her territories. But without such permission the subjects of such belligerent powers have no right to equip vessels-of war, or to increase or augment their force, either with arms or with men, within the territory of such neutral nation. Such unauthorized acts violate her sovereignty and her rights as a neutral. All captures made by means of such equipments are illegal in relation to such nation, and it is competent for her courts to punish the offenders; and in case the prizes taken by her are brought *infra presidia*, to order them to be restored. These principles are believed to be fully warranted by the general law of nations, by the decisions of the court of this country, and by the laws of the United States, &c." The same learned judge then enlarges upon the provisions of the act of 1794, and continues as follows: "Thus, if there were any doubt as to the rule of the law of nations upon this subject, the illegality of equipping a foreign vessel-of-war within the territory of the United States is declared by the above law. This law was solemnly re enacted in 1818; and not only so, but several important provisions were added to it. The very sections (10 and 11) relied on by Mr. Hoffman, are among those additions. To argue, therefore, from

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those supplementary sections, as to the meaning of other parts of the statute, which existed twenty four years before them, is a logical anachronism. The truth is that the mischiefs contemplated in those sections were altogether different from those intended to be prevented by the previous ones. The act of 1794 was passed under an actual and oppressive experience of the degree to which the neutral feeling and policy of the country were endangered by permitting foreigners to build and equip vessels, and even to augment their naval force, in our harbors. I say, even to augment, because Mr. Hoffman seems to suppose that to increase an existing force is a greater offence against neutral duties than to create one anew, as if *minus centinel majus*, and not *vice versa*. It is true, the French privateers who gave so much trouble to the government in 1793 were, in general, built abroad; their commanders only claimed to enlarge their means of annoyance in our ports; but even this was felt to be a political mischief of too serious a character to be endured.

But in 1818 a new evil had sprung up. The spirit of privateering, excited by the recent war with England, had found, in the revolutions and civil wars of South America, a new and attractive theatre; and many of our citizens were notoriously violating their duties as neutrals, by taking part in those contests. For this reason it was provided that wherever a collector saw probable cause to suspect such an intention, he should be authorized to exact a bond that they would keep the peace, even when they should be out of the jurisdiction of their own country. But this part of the statute had nothing to do with the first, of which the object was to keep the peace at home and to preserve that strictly neutral feeling that has characterized all our political conduct, and so eminently contributed to our prosperity as a people. As is remarked by Johnson, J., in delivering judgment in the case of the *Bello Corrunes*, "national character has nothing to do with the question of an illegal outfit in our ports, which is equally an offence against our sovereignty, by whomsoever made "

As to the idea that, because the words of the 10th section are, that the owners and consignees of every armed ship, belonging wholly or in part to citizens of this country, shall enter

into bond that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities, &c., therefore the 3d section is to be confined in the same way to hostilities to be committed by the owners, the inadmissibility of such a construction is thus shown from the history of our legislation on this subject. But, independently of this, the common rules of interpretation would lead to exactly the opposite conclusion. The omission of so significant a qualification in the 3d section could not have been accidental. The interpolation of it, on mere conjecture, is doing the grossest violence to every canon of interpretation and to the plain sense of words. The tenor of that section is, that if any person shall, within the limits of the United States, fit out, and arm, &c., with intent that such ship or vessel shall be employed (by any one, not by the owners) in the service of any foreign prince, &c.

It is impossible for words to be more comprehensive; and putting the case, as I supposed it to be, that a ship confessedly built and equipped for war, and delivered in the port of New York to the agents of the Mexican government, no construction could, in my opinion, be put upon them broad and loose enough to save her from forfeiture. Suppose such a vessel, setting sail from the narrows, should capture a prize off our coast; would it be possible to resist the claim of the other belligerent to have restitution, if that prize were found within our jurisdiction? Suppose the mechanics who built and delivered her, not being paid, should libel her in an action for the price; would their suit be entertained when every word of their declaration or their libel would be a confession of trespass against a law of their own country? The statute punishing every one "knowingly" concerned in fitting out such a vessel, could the court hold him guiltless who alone fitted her out, and placed her in the hands of a belligerent, within our waters, as an instrument of aggression against one of our friends? But it is said that a distinction is made between military and commercial purposes, and that our laws permit our people to sell, though not to furnish, with a view to take a part in the war. I answer—first, that, whatever may be the general law of nations on this subject, the Supreme Court, in the case of the *Estrella*, declare that the statute of 1818 has

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gone further than the law of nations, and prohibited *all equipping of foreign belligerent vessels* in our ports; second, that, if the equipping is unlawful, every contract founded upon it is void, and, of course, a sale of a ship so equipped. But, third, the cases in our books that take the distinction referred to, turn on the uncertain character of the vessel itself. Thus, in the case of the *Alfred*, (3 Dall.,) the vessel had equipments suitable for war, but such as merchant ships often carried. She was built in contemplation of war between England and the United States, for purposes of privateering—very lawful purposes, at least in such a case. She was afterwards unarmed, sold to a French citizen—a private individual at Charleston—and taken thence to the West Indies, where, for the first time, she was equipped for war. This was ruled to be a case not within any prohibition, either by statute or the law of nations. But this case was not the one on which my opinion was given. To have made it a precedent, she ought to have been an acknowledged man-of-war, equipped and armed for war—professedly built for, and transferred to, a belligerent government—not a private individual—in a port of the United States. Such a case, however, has never occurred; and I should, indeed, be surprised if the Supreme Court should ever give its sanction, with or without a formal argument, to this pretended right of a citizen of the United States, knowingly, to make a valid contract of building and equipment, in direct violation of a statute prohibiting all manner of equipment, and even *augmentation* of a belligerent force.

The stress to be laid upon the equivocal character of the vessel, as commercial or military, will appear from what Sir William Scott says in 3 Rob., 331, and appendix, note: "Though the principle of considering the sale of ships-of war to the enemy as contraband is strictly held by the decisions of the court of appeals, the application of the principle has been restricted to cases in which no doubt existed as to the character of the vessels, or the purposes for which they were sold." That is the present law of nations. Now, I am of opinion that precisely the same distinction obtains in our statute law *mutatis mutandis*. I have no doubt, therefore, that the equipping of a vessel of-war in a port of the United States expressly

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for the use of a belligerent State—if she be delivered, or attempted to be placed, within our jurisdiction, under the control of the agents of such State—is an offence against the law of 1818, in all knowingly concerned in it.

But the case now made differs from the one supposed, in these material circumstances—1st. The vessel is not delivered and the property not changed within our jurisdiction; 2d. She is sent out of our port unarmed and unprepared for any hostile aggression; 3d. She continues under the control of our own citizens, and every possible precaution is taken to insure her pacific conduct on the high seas.

In short, it is a sale of a vessel abroad by citizens of the United States to a belligerent power. Does such a case fall within the law? Mr. Hoffman's observation, that the general sense of the community is, and has for a long time been, the other way, is certainly entitled to some weight, though I do not believe the country has given its approbation to some of the proceedings cited. That gentleman also broadly intimates that the Supreme Court, in deciding the case of the United States *vs.* Jennings, (6 Pet.,) were ready to rule that a trade in ships of war, ready equipped for battle, to a belligerent power, did not fall within the purview of the statute.

I confess this somewhat surprises me, but it does not convince me that words so plain, so precise, and so comprehensive, ought to receive any other interpretation than that which, on the first reading of them, presents itself to an unbiased mind. But I am always unwilling to set up a speculative opinion of my own against anything like settled practice, to say nothing of a judicial or *quasi* judicial authority. I will not, under such circumstances, in a case involving such highly penal consequences to an individual of whose moral innocence I have no doubt, advise harsh proceedings, especially where the commercial industry of the country, should my opinion be judicially overruled, may possibly have suffered by my error. But, while I would recommend to the Executive to go no further on this occasion than to take the bonds required by the tenth section, I do not concede the point. On the contrary, a state of general war might soon convince us of the necessity of reconsidering the whole subject; and I confess my present

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leaning to be, that all equipping, within our jurisdiction, of vessels of war for a belligerent, by an American citizen, knowing the purposes for which they are to be employed, is repugnant to the law of 1818. In other words, that all trading with a belligerent in ships of war ready equipped for service is contrary to our law as it stands. The accompanying prohibitions in the State of all enlistments in the United States, furnishes a strong ground to support this opinion. Such enlistments (if voluntary) are no more against the law of nations than equipping and furnishing ships; yet it will not be pretended that any attempt to enlist an American citizen within our borders, however covert or cautious, and wherever the service is to be rendered, on the first step towards it taken, is not utterly prohibited by the act. Another grave consideration is the facility which such an exception, once admitted, would furnish for avoiding the whole law and making it a mere nullity. In fine, however popular opinion may have recently changed on so important a subject, this act, like that of 1794, was intended to secure, beyond all risk of violation, the neutral and pacific policy which they consecrate as our fundamental law. The framers of both acts knew perfectly well that they were denying to our citizens rights which the law of nations allowed them to exercise, in good faith, for commercial purposes. They knew the price they were paying for peace; but they were willing to pay it. This act is the proof of it. It is a restraint on commerce—it may be a severe one. With that I have nothing to do. As the organ of the law, I am bound to declare that the restraint has, in my opinion, been imposed in the case first stated, and is not clearly inapplicable even to that now before me; but, as matter of sound Executive discretion, I would advise that the bonds be taken and the vessels suffered to sail, but without any equipment beyond the necessary means of defence, and with all precaution against the possibility of their acting offensively.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

HON. WALTER FORWARD,

Secretary of the Treasury.

Pleas before, and Jurisdiction of, Courts-Martial.

PLEAS BEFORE, AND JURISDICTION OF, COURTS-MARTIAL.

The plea of *autrefois acquit*, averring a former trial and acquittal for manslaughter in the supreme court of a State, and that said charge was sustained only by the same evidence as must be used to sustain the charge for violating the eighty-eighth article of the Rules and Articles of War, is not a bar to the proceedings to punish unofficer-like and ungentlemanlike conduct.

Whether, under the eighty-eighth article of the Rules and Articles of War, the accused can be brought to trial before the court-martial which, two years before, had issued an order for his trial, and suspended its execution under peculiar circumstances, *quere*.

OFFICE OF THE ATTORNEY GENERAL,
February 10, 1842.

SIR: I had the honor to receive yesterday your letter of the 8th instant, propounding to me the following questions:

“1. Whether, under the eighty-eighth article of the Rules and Articles of War, the accused can be brought to trial before the same court-martial, the original order for his being brought to trial having been issued April 10, 1840, less than two years after the commission of the offence, that order never having been discharged, but its execution suspended?

“2. Whether a plea in bar of his having been tried, in the supreme court of Florida, on the charge of manslaughter, sustained by the same evidence and involving the same facts as must be used to maintain the charge before the court-martial, is a good defence?”

1. To begin with the latter, I am quite clear the plea in bar of *autrefois acquit* is not good, the offence, which is the subject-matter of the second trial, being altogether different from manslaughter, viz:—unofficer-like or ungentleman-like conduct, to be punished according to the eighty-third article of war.

2. The other question presents greater difficulties. From your manner of stating it, I infer that the very same court-martial, which tried the officer the first time, remains in existence. I am the more inclined to this inference, because the general rule is that courts-martial continue in existence till they are dissolved by the same authority by which they were held or constituted. This is an important assumption for the purposes of this opinion. If the whole trial were now to begin

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de novo, I should think it barred by lapse of time, under the eighty eighth article. It does not appear to me that, on the facts disclosed in the papers sent to me, there was any such manifest impediment as is contemplated by the statute. So far from it, that not only was the officer all the time amenable to the jurisdiction, but he was actually tried; that the court erred in their judgment, was an excellent reason for ordering that judgment to be reviewed in a second trial, which was not done at the time, but is none whatever for putting the defendant a second time to answer *de novo*. The difference between a new trial and a new action, in reference to statute of limitations, is familiar; and this leads to an important question, which is to be decided rather by the course of practice in the War Office than by any very positive rule of the law that I know of upon the subject. What is it competent for you to do after General Macomb's order of May 22, 1840? That involves, in the first place, the inquiry, What was the effect of that order? It disapproved, and in my opinion, as I have said, very properly disapproved, the judgment of the court on the second plea in bar—considered as a plea to the jurisdiction of a court-martial, under any circumstances and to any extent, over an offence which happens, at the same time, to incur a penalty under the common penal law and to disgrace an officer. Had the plea been only dilatory, it might have presented more difficulty; especially had the officer charged been in *custody* of the common-law court, which, it seems, he was not. But the case is very different; here the plea was peremptory and perpetual, and ought, in my opinion, to have been overruled—the military offence charged being a different one and inducing different penalties from manslaughter—for I confine the competency of the court to the inflicting of a mere military penalty—that is, dismission, reprimand, &c.)

But, in fact, General Macomb did order the court to revise its sentence, and the sentence, for nearly two years, has not been revised. Common-law courts have their rules of practice, which settle what is to be done in cases of appeal not prosecuted. I am not aware of the practice, in this particular, of courts-martial. Formerly, in England, (previous to 1750,) a general commanding in chief, says McArthur, "was empow-

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ered to order the revisal of any sentence by a court-martial as he pleased, and, on that pretence, to keep in confinement a man who had been acquitted upon a fair trial." That is altered now, and the rule more agreeable to justice and the analogies of the law is, that no sentence given by any court-martial, and signed by the president thereof, shall be liable to be revised more than once. Now, my difficulty is, whether, General Macomb having omitted to order a revisal, it is competent for his successor to do it after the lapse of nearly two years.

I do not undertake to give a very positive opinion on this point, but I strongly incline to think it too late to order new proceedings, even if the same court be still in existence; for, otherwise it is clearly too late. However, the precedents are more within your reach than mine; and nothing is more probable than that you may find, on looking into them, that they have settled the practice the other way.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

HON. JOHN C. SPENCER,
Secretary of War.

INDEX

OF THE

PRINCIPAL MATTERS.

ACADEMY, MILITARY.

1. No person has the right to enter the limits of the post at West Point, not even to visit the post office there, unless specially authorized by the laws of the United States, or by some officer having authority to grant permission. *Cozzen's case*, 268.
2. Persons in civil life, residing permanently or temporarily at the post, or occasionally resorting to the hotel, may be prevented by the superintendent of the academy from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. *Ibid.*
3. The commandant of the post may order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy; and he may be lawfully removed by force. *Ibid.*
4. When, however, the United States have leased a dwelling-house within the post belonging to them, to an individual, they have no greater right than an individual would have in respect to the lease. *Ibid.*

ACCOUNTS AND ACCOUNTING OFFICERS.

1. Where there is a conflict of claims between an executor and his assignees for an award of moneys by the Third Auditor to the decedent, the treasury officers should pay the same to the executor, who is the legal representative. *Case of executors of Stiles*, 29.
2. Where assignments in due form are presented, and no objection is made to the right of the assignee, it may be paid to him. *Ibid.*
3. Accounts once closed and settled, under the circumstances of the present case, cannot be opened, except on the principles governing courts of equity in opening decrees. *Advice*, 148.
4. The accounts of marshals certified by the court, or one of the judges thereof, as provided in the fourth section of the act of May 8, 1792, are conclusive upon the accounting officers of the treasury, except in cases where charges shall be allowed by the court or judge for a service or purpose not mentioned in the acts of Congress, and where a greater sum shall be allowed than that fixed by law. *Advice*, 316.
5. The account of the marshal of the District of Columbia, for extra allowances to government witnesses on the trial for the burning of the treasury buildings, made by the circuit court, and certified, cannot be legally paid, notwithstanding the certificate, for the reason that no act of Congress authorizes payment of charges for such a purpose. *Advice*, 318.
6. The accounting officers of the treasury may allow an account, if it be a just one, of Charles J. Ingersoll, district attorney of the eastern district of Pennsylvania, notwithstanding his having been sued by the United States for various bonds placed in his hands for collection, for moneys received thereon, and for other moneys, (his account not having been set off in the suit,) and a judgment recovered by the United States against him for \$3,975 78, the same as if it were presented prior to the institution of that suit, as the said account was a matter separate and distinct from the subject-matter of

ACCOUNTS AND ACCOUNTING OFFICERS (*Continued.*)

- the suit, and a set-off not having been required to be made. *Ingersoll's case*, 345.
7. Where one of two or more contractors for transporting the United States mail shall have been guilty of a violation of the twenty-eighth section of the act of the 2d July, 1836, changing the organization of the Post Office Department and providing more effectually for the settlement of the accounts thereof, the Postmaster General may annul the contract and relet the route according to law. *Advice*, 436.
 8. It is inexpedient for accounting officers in any case, unless thereunto specially directed by act of Congress, to re-adjudicate upon the items of an account once considered and settled in their offices. *McCalla's case*, 461.
 9. If the practice be allowed, the experiment will be made upon every change of accounting officers, by persevering claimants who may imagine themselves entitled to more than they have been allowed, to procure a reconsideration and revision of former decisions; and the same would be likely to result disadvantageously to the government. *Ibid.*
 10. Accounting officers should observe the principles recognised by Congress and the courts in adjusting accounts for army supplies. *Thomas's case*, 463.
 11. Accounting officers should observe the certificates of district judges, accompanying accounts of district attorneys and marshals for services rendered or disbursements made by them in the regular discharge of their official duties. *Waddell's case*, 497.
 12. Marshals have no control over the practice of the courts, nor over the kind of process which they may issue; they are simply bound, as officers of the courts, to execute the process issued to them. *Ibid.*
 13. In a matter of general and established practice, the regular taxation of the costs, and their allowance in due form by district judges, are binding and conclusive upon the accounting officers. *Ibid.*
 14. Where a marshal received, in due course of law, processes of summons and subpoena for the same witnesses, (it being the usual mode of procuring the attendance of witnesses in the court from which they issued,) and served the same as required, he is entitled to his fees for both services, on their being allowed and certified by the district judge. *Ibid.*
 15. It is the duty of accounting officers to examine and pass upon all the items of an account before any appeal can be made to the President. *Otis's case*, 500.
 16. The accounting officers may allow an adequate compensation to district attorneys, over and above their annual salary and stated fees, for services rendered under special instructions to discover criminals, and the evidence of their guilt. *Advice*, 515.
 17. Although it is doubted whether an account which has been finally adjusted, settled, and closed, ought to be re-opened, the claim in behalf of William Otis, late collector of customs at Barnstable, not having been fully settled, may now be settled without violating such a rule. *Advice*, 521.
 18. Where an act of Congress directs the accounting officers to recognise a particular judicial decision in the settlement of accounts, it is their duty to do so, and to conform their action thereto. *Thomas's case*, 524.
 19. Where a contractor for army supplies agreed to furnish for the army, upon the requisition of the commandant, a supply of provisions for six months in advance, at Detroit, and for nine months at Mackinac, and was required by the commanding officer to deposit more rations than were required for six months' supply of the troops stationed at Detroit, and ten per centum in addition for contingencies; and the question of the rate of compensation for the excess having been passed upon by a court, and the matter sent to the accounting officers to be adjusted on principles of justice and equity, by an act of Congress requiring them to recognise the judicial decision—DECIDED, that the contractor must be held to supply at his contract price the amount necessary for six months' supply at Detroit, and nine months' supply at Mackinac, and ten per centum besides for contingencies, and no more, and that for the excess he should be allowed the fair market value. *Ibid.*

ACCOUNTS AND ACCOUNTING OFFICERS (*Continued.*)

20. Accounting officers cannot, in the innumerable cases in which Congress directs specific sums to be paid to individuals, examine and settle previously existing claims and credits against such individuals. *Milnor & Thompson's cases*, 533.
21. Accounting officers are in general bound by the allowances and certificates of district judges in relation to the accounts of marshals presented for adjustment. The law which requires the judges to act and to certify their action, makes their allowances and certificates conclusive upon the accounting officers in all cases where the service or purpose is enumerated in the act of Congress, and the sum allowed therefor, is not exceeded in the amount certified. *Advice*, 536.
22. Where it is the settled practice of the court to procure the attendance of witnesses by the service both of the process of summons and subpoena, and an order issues to the marshal to summon witnesses, that officer is entitled to an allowance of fifty cents for performing the order, and the stated compensation for serving the summons and subpoena. He cannot disregard the orders or process issued by the court, even though they are superfluous; but must execute such as shall be issued to him in the ordinary practice, and for which he is entitled to the prescribed fees at the hands of the government. *Ibid.*
23. The marshal cannot be allowed more for the service of a summons, where a subpoena and summons shall have been issued to him to obtain the attendance of a single witness, than the sum prescribed for summoning a single witness. *Ibid.*
24. The taxation of the court, and the allowance and certificate of the judge, are conclusive upon the accounting officers when the service or purpose is enumerated in the act of Congress, and the sum allowed therefor is conformable to the rate of compensation therein prescribed. *Ibid.*
25. The United States are liable to clerks of circuit courts for their fees properly chargeable to plaintiffs, in suits in which the United States are plaintiffs, and the accounting officers may allow them, even though marshals may have collected them of defendants and have not paid them over. *Advice*, 575.
26. The accounting officers may allow the district attorney of the District of Columbia a reasonable compensation, over and above his salary and stated fees, for attending on the part of the United States upon the taking certain depositions in said district in a case depending in the circuit court of Missouri. *Advice*, 599.
27. The accounting officers may allow the district attorney of Vermont his expenses for numerous journeys undertaken and performed with the approbation of the Solicitor of the Treasury, for the purpose of securing certain payments due to the United States, and for superintending the sale of certain real estate. *Kellogg's case*, 612.
28. The accounting officers will observe that under the act making appropriations for the civil and diplomatic expenses of the government for the year 1841, district attorneys, clerks, and marshals are limited in their charges to the rates of fees prescribed by the proviso. *Hoffman's case*, 627.
29. The accounting officers are not authorized to allow interest on claims for losses occasioned by troops in the service of the United States, unless the same shall be provided for in the act under which they are authorized to be allowed and paid. *Wood's case*, 635.
30. The officers of the Treasury may examine into the facts and circumstances which constitute the grounds of certain Florida claims, in order to determine whether the decisions of the judges are just. *Ibid.*
31. The law has conferred upon the Secretary of the Treasury in such cases a jurisdiction as plenary as that exercised by the judges. *Ibid.*
32. Accounts for services rendered and expenses incurred of the nature of those specified in the act of 3d March, 1841, must be limited to the rates therein prescribed. *Advice*, 658.

ACCOUNTS AND ACCOUNTING OFFICERS (*Continued.*)

33. The compensation of members and officers of the Senate, when certified by the President thereof, is a public account, and should be passed as such by the accounting officers. *Dickins' case*, 662.
34. In passing accounts for compensation and mileage of Senators, the accounting officers should respect certificates of the President of the Senate, as they are conclusive upon the matter between that body and the treasury. *Ibid.*
35. The accounting officers are not authorized to allow the claims of the Florida militia, who refused to render, or who, after being mustered, were disbanded without having rendered any service. *Advice*, 687.
36. The accounting officers have authority to reconsider a matter that had passed from the executive department to the legislative, under and pursuant to the act of March 3, 1841, chapter 18, section 2. *Case of Clements, Bryan & Co.*, 731.
37. They are directed to settle and adjust the accounts of the claimants under a contract alleged to have been made on the 12th June, 1838, for subsisting and emigrating the Cherokee Indians, upon principles of equity and justice; but, in settling them, the contract of the claimants with the United States of the 27th June, 1838, must be taken into consideration. *Ibid.*
38. There are no obligations resting upon the government to indemnify claimants for an amount of provisions beyond what might be necessary for furnishing six thousand Indians during the probable period of their journey. *Ibid.*
39. The number of Indians to emigrate being left indefinite in the contract itself, making a case of latent ambiguity, parol evidence is admissible to show what the contract really was. *Ibid.*
40. The contractors are entitled, in strict law, to the difference between the contract price of the provisions they were bound to furnish and the actual value or market price of them in the country where they were to be supplied; but, by the act of March 3, 1841, the accounting officers are bound to call for proof that the provisions were actually procured to be furnished, and loss on them actually sustained, before making any allowance whatever. *Ibid.*
41. The act of March 3, 1841, which is a positive enactment specially applicable to the case, so far alters the common rule upon the subject of damages for breach of an executory contract, as to supersede that rule, and must govern the department. *Ibid.*

ACTIONS.

1. To an action founded on a pre-emption claim, purchase without notice of prior equities is a valid defence. *Advice*, 91.
2. Where an action was commenced and prosecuted to judgment against Commodore Elliott, for acts done in the performance of his official duties—*HELD*, that he ought to be indemnified. *Elliott's case*, 306.
3. The laws of the United States do not prohibit persons enlisted in the military service of the United States from bringing actions to recover damages, in State courts, for assaults and batteries committed on them by non commissioned officers within the limits of a fort. *Advice*, 498.
4. There is no provision of law concerning intercourse with the Indian tribes, or conferring jurisdiction upon courts, which can enable the United States to maintain a civil action against a debtor residing in the Indian country, upon a contract or indebtedness created in the States. *Advice*, 514.

ADMINISTRATORS.

1. Administrators of all and singular the goods, chattels, and credits, of a claimant are "legal representatives" within the act to provide for liquidating and paying certain claims of the State of Virginia, passed 5th July, 1832. *Advice*, 43.
2. The orphans' court of the county of Washington has power to grant letters of administration in respect to assets existing in the county, and payments made by the Treasury Department, to an administrator thus appointed, are regular; yet, in a case where the decedent resided in Baltimore, and left a will appointing an executor there, and letters granting administration *de*

ADMINISTRATORS (Continued.)

bonis non are afterwards granted in Maryland upon the same estate, the letters issued in Washington become subordinate to them. *Case of Administrator of Thompson*, 89.

3. Administrators of the holders of military bounty land warrants are not entitled to the script issued thereon—the script being of the nature of real estate goes to the heirs-at-law. *Advice*, 382.
4. Where Creek reserves died within the five years during which their reserves were to be withheld from sale, and the lawful administrators sold the reserves, and paid over the proceeds (less the expenses) to the Indian widows, as the heirs, and the question of other heirs being now raised, in opposition to the confirmation of the sales to the purchasers, who have paid the consideration money therefor once in full—*DECIDED*, that the purchasers are entitled to the confirmations which they ask, and should not be required to pay a second time any portion of the purchase money. *McDougald's case*, 578.
5. The President of the United States may properly confirm sales of Creek reservations made by administrators pursuant to the orders of courts having jurisdiction, whether the distribution of the proceeds among the heirs shall have been correctly made or not; provided the purchasers shall have paid in the purchase money in good faith to the administrators or legal representatives. *Advice*, 597.
6. But where purchasers have withheld any portion of the purchase-money on any pretence, or the administrators themselves were the purchasers, and have not accounted for the purchase-money, sales ought not to be confirmed. *Ibid.*
7. The son and administrator of a person for whom Congress shall have ordered a medal to be struck, may receive it. *Case of the administrator of Neville*, 640.

ALIENS.

1. Aliens are entitled to claim pre-emptions under the acts of 1830 and 1834, especially where the local law authorizes them to hold and convey real estate. *Advice*, 90.
2. Alien subjects of a State, with whom the United States are at peace, who shall have placed themselves under our laws, are entitled to protection; and the Executive will see that such protection is given. *Advice*, 253.
3. But where aliens shall have suffered violence from citizens of the United States, they can be protected only by the redress to be afforded in the courts, and the special interposition of the legislature. *Ibid.*
4. The State courts only have jurisdiction of the criminal offence in such cases; the circuit court of the United States of a civil action, where the offenders are citizens. *Ibid.*
5. Until the passage of an act by Congress authorizing the enlistment of aliens into the military service of the United States, such enlistments must be regarded invalid. *Advice*, 671.

ALLOWANCES.

See **CLAIMS, COMPENSATION, AND INTEREST.**

AMISTAD, CASE OF THE.

1. The schooner *Amistad*, a Spanish vessel, having cleared from one Spanish port bound to another, with regular papers and a cargo of merchandise and slaves; and whilst at sea, being subjected to the control of the negroes on board, by their rising upon the whites and killing the captain, his servant, and two of his seamen, and assuming command with a view to carry the vessel to the coast of Africa, but failing in that object through the contrivance of two white Spaniards who run her near to the coast of the United States, where she was taken by a vessel of the United States and sent into New London for examination and such proceedings as the law of nations warranted and required; and being demanded, with the negroes, by the Spanish minister, under the ninth article of the treaty of October 27, 1795, between Spain and the United States—*DECIDED*, that the case is within said ninth article of the said treaty, and that the vessel and cargo be restored to the owners, as far as practicable, entire. *Advice*, 484.

AMISTAD, CASE OF THE (*Continued.*)

2. The expenses incurred on account of the negroes taken out of the *Amistad* cannot be defrayed from the appropriation of the 3d March, 1819, in the act in addition to the acts to prohibit the slave trade. *Advice*, 510.
3. The Spanish schooner *Amistad* having been condemned (not for any breach of the laws of the United States,) and sold by order of the district court of the United States for the State of Connecticut, and the purchaser having applied for a register—*DECIDED*, that he is not entitled to a register, but that documents showing the order of sale, its execution by the proper officer of the United States, and the purchase and title of the present owner, ought to be issued to him. *Advice*, 606.

APPOINTMENTS.

1. Appointments of navy officers to higher stations in the same service, fixing ante dates of rank, entitle the appointees to increased pay from the ante date provided they were in the performance of duties compatible with the grade to which their promotion elevated them. *Advice*, 124.
2. The Senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations; and such nominations fail whenever it disagrees to them. *Coxe's case*, 188.
3. The Senate may suggest conditions and limitations to the President, but cannot vary those submitted by him; for no appointment can be made, except on his nomination, agreed to without qualification or alteration. *Ibid.*
4. The arrangements for the exploring expedition being at the discretion of the President, he may appoint and employ a medical assistant thereto without the formality of an examination and approval by the board of surgeons. *Advice*, 289.
5. The President and Senate, by nomination and confirmation, may correct the date of military appointments even after as great a lapse of time as that which has occurred in the case of Captain Twigg. *Capt. Twigg's case*, 307.
6. Appointments to subordinate offices in the customs are required to be made with the approbation of the Secretary of the Treasury; yet, such officers may be removed by collectors without consulting the Secretary. *Advice*, 325.
7. It is competent for the surveyor of a port to depute inspectors of the customs appointed by the collector of customs at the same port, with the approbation of the Secretary of the Treasury, to act as markers. *Advice*, 331.
8. The same individual having been appointed, under the act of 30th June, 1834, a superintendent of Indian emigration at a stipulated salary, and afterwards a commissioner to negotiate a treaty with the Miamies at a per diem compensation, cannot, under the 30th section of said act, receive but one compensation during the same period. *Col. Pepper's case*, 511.
9. The appointment of receivers general under the act of 4th July, 1840, are to be sealed and recorded at the State Department. *Advice*, 569.
10. Where an officer appointed temporarily by the President is afterwards appointed by nomination, with consent of the Senate, his new appointment commences from the period of any official act indicating his acceptance of the office, whether it be a direct communication to that effect, or his taking the oath of office, or his giving a bond. *Advice*, 577.
11. The liabilities consequent upon a reappointment to an office already held, do not commence until the term commences for which such reappointment is made. *Frick's case*, 626.
12. The constitution authorizes the President to fill vacancies that may happen during the recess of the Senate, even though the vacancy shall occur after a session of the Senate shall have intervened. *Advice*, 673.

ASSIGNEES.

1. The claims of assignees of awards of moneys must give way to those of executors in cases of conflict between them; but, where assignments in due form are presented and no objection is made, awards may be paid to them. *Advice*, 29.

ASSIGNEES (*Continued.*)

2. The third section of the act of the 19th of February, 1831, does not confer the right of purchase and consequent title to the widow and children of A. Follin, deceased, to the exclusion of his assignee, claiming under the provision of the second section of the act of February, 1831, and 19th of February, 1833. *Advice*, 29.
3. Assignees of Indians entitled to reservations under the Choctaw treaty of 1830, are entitled to patents from the government in certain cases. *Advice*, 49.
4. Transfers of reservations by assignees, whose assignments express them as a firm, are not valid when executed by one member thereof, but only when executed by all, unless the partner assigning exhibit authority to assign from all. *Advice*, 423.
5. But where the reservee assigned to a firm, as to "M. W. Perry & Co.," and the transfer by the firm was signed in that manner, the assignment is valid, and the patent may issue to the assignee. *Ibid.*
6. Where there are two assignors, and the names of both to the assignment are in the same handwriting, the assignment is invalid as to him who did not sign, unless the other exhibit authority. *Ibid.*
7. Where approved contracts are endorsed in blank, with the names of first purchasers endorsed thereon, the endorsement of the name or the purchasers on the approved contracts is evidence of their having disposed of them; and possession by others is sufficient evidence to warrant the issuance of the patents to those having possession of the approved contracts. *Ibid.*
8. These assignments are not required to be acknowledged, and ought not to be made subject to any rule made after they were executed. *Ibid.*
9. Where an assignee in blank of the floating right of pre-emption to a specific quantity of land is in conflict with an assignee of the same right which has been actually located, and the Commissioner of the General Land Office is satisfied that the assignment in blank is not clearly fraudulent, he ought to issue the patent to the original pre-emptor, leaving the conflicting claims to be settled by courts of justice. *Advice*, 608.
10. Patents for reserve lands under the Creek treaty of 1832 are to be issued to purchasers, owners, assignees, or transferees; and claimants must show themselves to be within the description of persons entitled, by exhibiting authentic evidence of the fact. *Advice*, 644.
11. But a succession of assignments endorsed on the original deed, if accompanied with satisfactory proof of genuineness and fairness, is sufficient to authorize the issuing of a patent. *Ibid.*
12. Transfers and assignments by agents of a land company, acting within the scope of their authority, are valid; yet, before the Commissioner of the Land Office gives effect to them; he should have satisfactory proof that such agents have acted within the compass of their authority. *Ibid.*
13. The disallowances of a pre-emption claim made by an assignee of a certificate of purchase, by the register and receiver, who had competent authority to judge of its validity, on grounds satisfactory to them that it was unfounded, is conclusive against the claim. *Case of Norton and McDonald*, 664.

ATTORNEY GENERAL.

1. The Attorney General does not possess the power of revising the decisions of the Executive departments, deliberately made, and entirely satisfactory to the Secretary thereof; and will not give opinions at the instance of parties where no further action is to be had in the premises. *Advice*, 39.
2. The Attorney General has no authority to settle questions of fact, nor to give any opinion or advice on questions of law, except for the assistance of the officer calling for his opinion on points stated. He is obliged to take the facts of a case to be as they are stated to him; and to predicate his opinion thereon. *Advice*, 309.
3. The Attorney General having no power to give an official opinion at the request of the head of a department, except on matters that concern the official powers and duties thereof, all opinions given by him in respect to claims under the Cherokee treaty have been extra-official and unauthorized. *Advice*, 367.

BANKS.

1. The deposit banks are required to pay interest upon any sum which may remain in them to the credit of the Treasurer of the United States over and above three-fourths of their capital, respectively, for the period which may elapse before the Secretary of the Treasury shall find it expedient to transfer it to another bank—whether the same have been used or remained unemployed. *Advice*, 141.
2. Deposit banks from which a transfer is ordered, are liable for interest until the moneys transferred shall be actually placed to the credit of the Treasurer in those to which the transfers shall be made. *Ibid*.
3. Money held by the agencies of deposit banks must be regarded, in respect to liability for interest, as well as in all other respects, precisely as if no agencies existed, and as if the money were held at its ordinary place of business, and in the ordinary way. Interest should be charged upon the amount which may be held by both the bank and its agencies above one-fourth of the capital stock. *Ibid*.
4. Banks employed as depositories before the passage of the act of 1836, which have had an amount exceeding one-fourth of their capital during the whole of the fiscal quarter elapsed since the act, are chargeable with interest for the quarter, although their agreements were not executed until a part of the term had expired. *Advice*, 156.
5. But in order to make them liable for the interest, the deposits must have exceeded one quarter of the capital for the whole quarter. *Ibid*.
6. Under the order of the Treasury Department, approved by the President on the 5th of October, 1833, disbursing officers may legally keep the public moneys intrusted to them on deposit in the banks heretofore selected by the treasury, and which now have the public money. *Advice*, 233.
7. Disbursing officers may legally make special deposits of their funds in non-specie-paying banks, if so directed by the President, where they will agree to receive the funds in that way. *Ibid*.
8. Any bank not restrained by its charter, or other statutory enactments, not by judicial process, from receiving special deposits, is competent to enter into a contract for the safe-keeping and return of a special deposit in such way and on such terms as may be agreed on. *Ibid*.
9. Payment by disbursing officers to the credit of the United States must be made to the Treasurer, or to some specie paying bank. *Ibid*.
10. The bonds of the deposit banks are analogous to the bonds given by public officers on their appointment, and should be retained in the public archives, unless Congress shall otherwise determine. *Case of the Mechanics and Farmers' Bank*, 292.
11. All banks are disqualified to be selected as banks of deposit which shall have issued or paid out any note or bill of their own or other banks of a less denomination than five dollars. *Advice*, 341.
12. The act to regulate deposits of the public money authorizes the selection of banking corporations chartered by the acts of the legislatures of the different States, in those States, only, as depositories, plainly excepting private banking associations, and such as the North American Trust and Banking Company. *Case of the North American Trust and Banking Company*, 385.
13. The Secretary of the Treasury has no legal authority to investigate the condition of the banks of Wisconsin Territory against their consent. *Advice*, 404.
14. The Bank of America having paid out bills of other banks of a denomination less than five dollars, has incapacitated itself from being a depository of the public money. *Case of the Bank of America*, 411.

BLOCKADE.

1. Where an American vessel had entered and cleared from a port under blockade, and whilst returning to New Orleans, was captured by a vessel belonging to the French blockading squadron, from which the captain of the former rescued her and brought her into the port of New Orleans, to which

BLOCKADE (*Continued.*)

- he was destined; and demand, subsequently, being made of the Executive to deliver up the vessel and cargo, both on account of the said breach of blockade and the rescue—*DUNCAN*, that the captors have no right of property in said vessel and cargo; and that the liability of the vessel to condemnation, if it ever existed, has ceased by the termination of her voyage at the port of her destination. *Capt. Clarke's case*, 377.
2. The case made by the French government calls for a judicial decision settling certain questions of fact concerning the legality of the blockade, capture, &c., before the Executive can act. *Ibid.*
 3. Independently of this, there is no constitutional right vested in the Executive to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, nor legally adjudged to belong to another. *Ibid.*

BONDS.

1. The persons referred to in the act of 19th March, 1836, for the relief of the sufferers by fire in the city of New York, before its modification by the amendatory act of the 5th of April, who, upon notice given by the collector, made returns of their losses, and tendered new bonds, which were accepted by the collector, are entitled to the full benefit of that act. *Advice*, 123.
2. But those whose bonds were proffered, but not executed, prior to the passage of the amendatory act, are not entitled to the benefit of the original law. *Ibid.*
3. The Solicitor of the Treasury may grant indulgences upon custom-house bonds, in the form of instructions to district attorneys who shall have received them for prosecution, in such cases and on such terms as shall be deemed advantageous to the United States. *Advice*, 247.
4. And, although the Solicitor has no jurisdiction of bonds until they are placed in the hands of district attorneys, he may, in proper cases, give the instructions conditionally in advance, as to the course to be pursued. *Ibid.*
5. The bonds of the deposit banks are analogous to the bonds given by public officers on their appointment, and should be retained in the public archives, unless Congress shall otherwise determine. *Case of the Mechanics and Farmers' Bank*, 292.
9. Deputy postmasters who shall be required to execute the functions of depositaries under the act of July 4, 1840, ought to give new bonds, with sureties, to be approved by the Solicitor of the Treasury. *Advice*, 575.
7. Collectors who are made depositaries of the public moneys under the act of 4th July, 1840, are required to execute a new bond, with sureties, conditioned for the performance of the new duties required by said act, as well as those before required. *Hoyt's case*, 584.
8. Collectors are not required to give bonds in a larger amount than before under the act of July 4, 1840, unless it shall be deemed necessary by the proper officers of the department; but they are required to give new bonds with new conditions embracing new duties devolved upon them, as well as those previously required. *Hoyt's case*, 586.
9. Under the act of July 4, 1840, all collectors of customs are required to execute bonds embracing, in terms, the new duties to which they are or may be subject. *Advice*, 600.
10. Even at ports where there is a receiver general, there are some new and increased fiscal duties imposed on the collector which did not previously belong to him. *Ibid.*
11. If the proper department shall deem it expedient, it may, in lieu of a new bond, embracing all the duties of the collector, take a new bond in a suitable penalty, embracing the new duties only, leaving the old one outstanding. *Ibid.*
12. Collectors of customs are required to execute new bonds embracing the new duties imposed on them by the act of 4th July, 1840. *Advice*, 609.

BONDS (Continued.)

13. The act requires all collectors of customs to safely keep, without loaning or using, all the public money collected by them, or otherwise at any time placed in their possession or custody, till the same is ordered by the proper department to be transferred or paid out, except as therein particularly provided; and although he is required to pay it over, the character of his responsibilities and his duties is changed, even though there be no increase of money on his hands. *Ibid.*

BREACHES OF NEUTRALITY.

See **NEUTRALITY.**

BREVETS AND BREVET PAY.

1. To entitle a brevet brigadier general to pay according to his brevet rank, he must be in command of a brigade regularly consisting of two regiments. *Gen. Armistead's case*, 83.
2. The act of April 16, 1818, has excluded officers of the Ordnance Department from the benefits of their brevet rank. *Major Baker's case*, 84.

CAPTURES.

1. Where an American vessel had entered and cleared from a port under blockade, and, whilst returning to New Orleans, was captured by a vessel belonging to the French blockading squadron, from which the captain of the former rescued her and brought her into the port of New Orleans, to which he was destined; and demand, subsequently, being made of the Executive to deliver up the vessel and cargo, both on account of the said breach of blockade and the rescue—**DECIDED**, that the captors have no right of property in said vessel and cargo; and that the liability of the vessel to condemnation, if it ever existed, has ceased by the termination of her voyage at the port of her destination. *Capt. Clarke's case*, 377.
2. The case made by the French government calls for a judicial decision settling certain questions of fact concerning the legality of the blockade, capture, &c., before the Executive can act. *Ibid.*
3. Independently of this, there is no constitutional right vested in the Executive to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, nor legally adjudged to belong to another. *Ibid.*

CHARTER-PARTY.

1. The owners of vessels chartered for the purpose of transporting Indians from Florida, but not employed for that purpose, are legally entitled to the stipulated demurrage and the actual damage occasioned by the non-fulfilment of the contracts. *Advice*, 280.

CLAIMS.

1. No allowance for horses or other property impressed into the service of the United States, nor for any special damage done to individuals or their property by the troops of the United States or the enemy, can be allowed by the first section of the act of 28th May, 1836. *Advice*, 162.
2. Where a question concerning a doubtful claim has been submitted to Congress, and an actual appropriation made by that body of the precise amount, there can be no valid objection to the payment. *Early's case*, 169.
3. Where the widow of an officer of the navy died before the passage of the act of 1837, her representatives can take nothing by the act, as no right to a pension vested in her. *Case of representatives of Mrs. Murray*, 199.
4. Where a merchant vessel was detained by the agent of the United States, at Buenos Ayres, and by him sent to the United States, and an act of Congress was subsequently passed directing the actual loss to the owner to be ascertained and paid, and the Fifth Auditor had disallowed a portion of the items claimed—**HOLD**, that the owner is entitled only to the actual loss sustained. *Mrs. O'Sullivan's case*, 216.
5. The loss of the use of a vessel thus detained, during her detention, was the first and most direct consequence of that detention; the damage occasioned thereby is not constructive and consequential, but actual, positive, and real. *Ibid.*

CLAIMS (*Continued.*)

6. The Auditor may adopt the principle of difference in value, or demurrage, as the standard of his action; adding thereto, in either case, such additional allowances as will meet the actual loss of the party. Where the difference in value is adopted as the standard, interest, and personal and other expenses, are to be added; where demurrage is the standard, all necessary expenses, not relating to the use or management of the vessel, are to be allowed in addition. *Ibid.*
7. Interest on claims against the United States is properly allowable where the claimant, in a suit against him, obtained a decision in his favor, and the act of Congress providing for payment proceeded upon the knowledge that interest had been allowed by the court. *Advice*, 294.
8. Claims for interest on treasury notes, issued under the act of 12th October, 1836, and placed in the hands of disbursing officers to meet public liabilities, are not valid except for the time subsequent to their actual issue by such officers. *Advice*, 296.
9. The claims of the first and second classes of reservees, provided for in the thirteenth article of the treaty of December, 1835, with the Cherokees, for money in lieu of their interests, are valid notwithstanding the supplementary articles. *Advice* 297, 304.
10. Where the Treasurer of the United States issued a draft upon a deposit bank to a navy agent, who sold it in order to raise money for necessary expenditures, and the draft was afterwards presented, and dishonored—*HELD*, that it was proper for the Treasury Department to pay the interest and costs incident to the dishonor, and the amount, from the original appropriation under which it was drawn. *Advice*, 320.
11. A captain, entitled to keep three horses only, can only draw forage in kind, or claim an equivalent in money, for that number; and if he draw for horses belonging to the United States, it must be deducted from that number. *Advice*, 340.
12. Claims under the treaty with the Cherokees were to be examined and adjudicated by commissioners to be appointed by the President, by and with the advice and consent of the Senate, and their decisions were to be conclusive. *Advice*, 367.
13. The claim of the city of Augusta, for expenses incurred and supplies furnished on account of the public service for the defence of Florida, comes within the act of May 28, 1836, and ought to be allowed. *Advice*, 388.
14. The United States are bound to pay the Spanish inhabitants of Florida the value of slaves carried away or killed by the troops of the United States shortly prior to the treaty with Spain of the 22d of February, 1819. *Advice*, 391.
15. Remuneration should also be made for the services of such slaves as have been restored to their owners, during the period of time their owners were deprived of their services. *Ibid.*
16. The claim of General Scott for a compensation of eight dollars per day over and above his regular pay as major general, for superintending the removal of the Cherokees under the direction of the Secretary of War, cannot be allowed without violating the proviso to the act of 3d March, 1835. *Advice*, 395.
17. The claim of General Scott for compensation, at the rate of eight dollars per day over and above his regular salary, for arranging and superintending the removal of the Cherokees, even though he were a special commissioner to effect that object, cannot properly be allowed. *Advice*, 416.
18. The Cherokee fund is not liable for damages arising from the non-fulfilment by the government of contracts made for the removal of, and supplies for the Cherokee Indians. *Advice*, 431.
19. Where a contractor for certain specified rations for the army, to be delivered at a particular place, including a certain ration of distilled liquor, was, after the execution of his written contract, directed by the War Department to furnish an additional ration of liquor to the troops on fatigue duty—*HELD*, that

CLAIMS (*Continued.*)

- he had the right to elect in respect to the price to furnish such ration under his contract, or to demand the fair market value thereof at the time and place, &c. *Thomas' case*, 463.
20. Interest cannot be legally claimed upon the stocks issued by the State of Maryland, and redeemable at the pleasure of the State, which are held in trust for the Chickasaws, from the time when the funds were provided by the State for the redemption of the principal. *Advice*, 495.
 21. Whilst the claim of an attorney for the Cherokees cannot be paid out of funds due them under the 9th article of the treaty—if the department shall be satisfied that the contract between him and his principal is free from fraud, and his claim is for a just compensation for services rendered, the department ought to recognise him as having an interest in the fund, and pay him accordingly. *Churchill's case*, 504.
 22. Payments directed by Congress to be made to M. and T. should be made by the Secretary of the Treasury to them or their constituted attorney, notwithstanding the interposition of claims by third persons grounded on assignments, insolvent or other proceedings, anterior to the passage of the act directing the payment. *Milnor and Thompson's case*, 533.
 23. Contractors for the removal of the Chickasaws to their new homes must be paid from the appropriation of the Chickasaw fund made by the act of the 20th of April, 1836, even though some of the Indians did not avail themselves of the means furnished to remove them. *Advice*, 561.
 24. The United States are liable to clerks of circuit courts for their fees properly chargeable to plaintiffs, in suits in which the United States are plaintiffs, and the accounting officers may allow them, even though marshals may have collected them of defendants and have not paid them over. *Advice*, 575.
 25. Neglect of the officers and agents of government to give a contractor for rations, to be furnished the Creek Indians, due notice of an unexpected large number of them to be removed, and supplied with rations at an unreasonable period of the year, is sufficient to excuse the non performance of the contract, and to protect the contractor from damages. *Advice*, 632.
 26. The first section of the act of 4th February, 1819, entitled "An act to authorize the payment in certain cases, on account of treasury notes which have been lost or destroyed," applies to notes issued from 1837 to 1841, inclusive. *Advice*, 634.
 27. The Secretary of the Treasury may examine into all the facts and circumstances which constitute the grounds upon which a judgment for losses has been rendered, and determine, upon the whole case, whether the decision of the judge is just. *Wood's case*, 635.
 28. The decision of the judge in such a case is not analogous to the award of an arbitrator; and if it were, the United States have not agreed to be bound by it. *Ibid.*
 29. The law has conferred upon the Secretary of the Treasury in such cases a jurisdiction as plenary to decide upon the whole case, as upon the judge himself. *Ibid.*
 30. The Secretary of the Treasury, however, has no legal power to re-commit a case to a judge for re-adjudication. *Ibid.*
 31. Interest on claims for losses occasioned by troops in the service of the United States is not allowable, unless the same shall be expressly provided for in the act of Congress under which the claim is authorized to be paid. *Ibid.*
 32. The claim of Lieutenant Hunter for reimbursement of expenditures in making experiments for the propulsion of war steamers by horizontal wheels, is within the act of Congress passed at the extra session, and that for making appropriations for the naval service in 1841. *Hunter's case*, 658.
 33. By the last clause of ninth article of the treaty of 1819, with Spain, and the acts of 23d March, 1823, and 26th June, 1834, the Secretary of the Treasury is required to pay the claims for injuries caused by the military operations of 1812 and 1813, on which a favorable report may have been made

CLAIMS (*Continued.*)

- by the judge of the superior court of St. Augustine, where, upon examination of the decision and the evidence on which it is founded, he shall deem the same to be just. *Case of Bunch's Executor*, 677.
34. In these cases the examination of the judge is to enlighten the mind of the Secretary, as the verdict of a jury in a feigned issue is to enlighten the conscience of the chancellor; and his decision is simply *arbitrium boni viri*, and not conclusive, in any degree, upon the Secretary. He must, nevertheless, look into the whole matter, and ascertain for himself whether the government is liable, and to what extent. *Ibid.*
 35. If the case be one of injury by the military operations referred to, in which no ordinary care of the proprietor or his agents, and no ordinary goodness of the property supposed to have been injured, would have guarantied it against the alleged injuries, it is within the treaty, and the claimant is entitled to his damages. *Ibid.*
 36. In respect to the damages, the Secretary ought to be satisfied that the consequences which are alleged to have ensued upon the trespasses in question, were no more than what, in the ordinary course of things, would be expected to be caused by them; that is, after they occurred, there was no *laches* on the part of the owner in his efforts to repair them, and that the evils, whatever they were, were not aggravated by some defect peculiar to the character and condition of his property. *Ibid.*
 37. The accounting officers are directed to settle and adjust the accounts of the claimants under a contract alleged to have been made on the 12th June, 1838, for subsisting and emigrating the Cherokee Indians, upon principles of equity and justice; but, in settling them, the contract of the claimants with the United States of the 27th June, 1838, must be taken into consideration. *Case of Clements, Bryant & Co.*, 731.
 38. There are no obligations resting upon the government to indemnify claimants for an amount of provisions beyond what might be necessary for furnishing six thousand Indians during the probable period of their journey. *Ibid.*
 39. The number of Indians to emigrate being left indefinite in the contract itself, making a case of latent ambiguity, parol evidence is admissible to show what the contract really was. *Ibid.*
 40. The contractors are entitled, in strict law, to the difference between the contract price of the provisions they were bound to furnish and the actual value or market price of them in the country where they were to be supplied; but, by the act of March 3, 1841, the accounting officers are bound to call for proof that the provisions were actually procured to be furnished, and loss on them actually sustained, before making any allowance whatever. *Ibid.*
 41. The act of March 3, 1841, which is a positive enactment specially applicable to the case, so far alters the common rule upon the subject of damages for breach of an executory contract, as to supersede that rule, and must govern the department. *Ibid.*

COLLECTORS OF CUSTOMS.

See CUSTOMS.

COLORED MEN.

1. The schooner *Amistad*, a Spanish vessel, having cleared from one Spanish port bound to another, with regular papers and a cargo of merchandise and slaves; and whilst at sea, being subjected to the control of the negroes on board, by their rising upon the whites and killing the captain, his servant, and two of his seamen, and assuming command with a view to carry the vessel to the coast of Africa, but failing in that object through the contrivance of two white Spaniards who run her near to the coast of the United States, where she was taken by a vessel of the United States and sent into New London for examination and such proceedings as the law of nations warranted and required; and being demanded, with the negroes, by the

COLORED MEN (*Continued.*)

- Spanish minister, under the ninth article of the treaty of October 27, 1795, between Spain and the United States—*DECIDED*, that the case is within said ninth article of the said treaty, and that the said vessel and cargo be restored to the owners, as far as practicable, entire. *Advice*, 484.
2. The expenses incurred on account of the negroes taken out of the *Amistad* cannot be defrayed from the appropriation of the 3d March, 1819, in the act in addition to the acts to prohibit the slave-trade. *Advice*, 510.
 3. The Executive will not set aside the proceedings of courts martial merely because they have admitted the testimony of negroes or made other mistakes, though objected to, where it appears, upon the whole case, that justice has been done and the verdict is substantially right. *Lieut. Hove's case*, 523.

COMMANDANTS.

1. The Commandant of the military post at West Point, may order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy; and he may be removed by force. *Advice*, 268.
2. No person has the right to enter the limits of the post at West Point, not even to visit the post office there, unless specially authorized by the laws of the United States, or by some officer having authority to grant permission. *Ibid.*
3. An officer in the actual command of any number of men sufficiently large to constitute a detachment of marines, according to the usage of the Navy Department, will entitle him to the allowance given in the 2d section of the act of March 2, 1827. *Advice*, 342.

COMMENCEMENT.

See COMPENSATION.

COMMISSIONS.

1. Where the commissions of officers of the navy ante date this rank the incumbents are entitled to increased back pay, provided they were in the performance of duties compatible with the grade conferred by such commissions. *Advice*, 124.
2. The President nominates, appoints, and commissions to office. The Senate have authority only to concur or non-concur. That body cannot originate an appointment nor vary the nomination of the President; unless the Senate shall concur in the nomination as made, in cases where concurrence is requisite, commissions cannot properly issue. *Coxe's case*, 188.
3. The commissions of the receivers general, appointed under the act of the 4th of July, 1840, should be made out, sealed, and recorded at the State Department. *Advice*, 569.
4. Where an officer appointed temporarily by the President is afterwards appointed by nomination, with the consent of the Senate, his new commission commences from the period of any official act indicating his acceptance of the office, whether it be a direct communication to that effect, or his taking the oath of office, or his giving a bond. *Advice*, 577.

COMMISSIONERS.

1. The Commissioner of the General Land Office may suspend the issuing of patents for land where it shall be discovered that the decisions in the cases were obtained by fraud, or were founded in material errors of fact or law. *Advice*, 93.
2. The Commissioner is authorized to prescribe the mode and kind of proof concerning the validity of claims to land under the act of 29th May, 1830, how and by whom it should be taken; but cannot prescribe anything as proof which is not such in fact, nor any rule as to its weight and force. *Advice*, 126.
3. Where it is intended to admit the oath of an interested party, it is generally provided for in express terms. *Ibid.*
4. Unsupported affidavits of settlers are not admissible as proof under the act. *Ibid.*

COMMISSIONERS (*Continued.*)

5. Competent proof is required; yet the Commissioner cannot properly require competent proof to be corroborated. *Ibid.*
6. The Commissioner has to judge of the proof offered under the act of 2d July, 1836, and may receive further evidence in support of the fairness and regularity of the claim. *Advice*, 149.
7. The Commissioner of Pensions was continued in office by the act of 3d March, 1835, two years from the passage of that act. *Advice*, 157.
8. Where a future time is expressed in an act of Congress, like "two years from and after the 4th day of March next," the law makers are to be understood as speaking from the moment when the bill was approved by the President, and became a law. *Ibid.*
9. The commissioners to adjust claims under the treaty with the Cherokees had conclusive authority in the premises. *Advice*, 367.
10. The same individual having been appointed, under the act of 30th June, 1834, a superintendent of Indian emigration at a stipulated salary, and afterwards a commissioner to negotiate a treaty with the Miamies at a per diem compensation, cannot, under the 30th section of said act, receive but one compensation during the same period. *Col. Pepper's case*, 511.
11. The Commissioner of the General Land Office properly refused to issue a patent for land entered by Governor Shannon in Ohio, and withdrawn from private entry in order to provide for executing the grant by Congress, by act of 24th May, 1828, of lands to the State of Ohio, for the purpose of aiding that State to extend the Miami canal from Dayton to Lake Erie, because it did not appear whether or not the land for which the patent was claimed was situated within the limits of the reservations, and because, if it were, the requisite notice had not been given by the register and receiver, as provided for in the regulations concerning the public lands. *Gov. Shannon's case*, 650.
12. The error as to the date of a certain report of the Commissioner of the Land Office, embracing the Maison Rouge claim, set out in a confirmatory act of 29th April, 1816, (being December 4, 1812, when it should read December 14, 1812,) is not fatal to claims mentioned in the said report. *Core's case*, 715, 737.

COMPENSATION.

1. The act of a Postmaster General in making extra allowances to mail contractors in consequence of alterations made, after the execution of the contract, in the frequency and speed of the conveyances used for transportation, and on account of the increased weight of the mailed matter, are not, where the account is still open, conclusive upon his successor; on the contrary, the latter possesses competent authority to look into such allowances, and where he finds them to have been founded on material errors of law or fact, to correct them as justice shall appear to require. *Case of Stockton Stokes*, 1.
2. District attorneys are entitled only to the salary allowed by the act of 1799 and by subsequent laws, and the per diem, mileage, and taxable fees for prosecuting before the federal courts in their respective districts delinquents for crimes and civil actions in which the United States are concerned, or have an interest, cognizable therein, unless some further special provision shall have been made by Congress for individual officers. *Case of Barker & Devereux*, 45.
3. Not being required by the laws defining their general duties to attend State courts, nor upon judges out of court, if their services are called for therein, or on other special occasions, and the fees taxed them in such State courts cannot be recovered, or are inadequate, they should be paid a fair compensation out of any moneys appropriated to the special objects in reference to which the services were rendered, or, in some cases, out of the judiciary fund usually provided in the general appropriation bill. *Ibid.*
4. Lieutenant Colonel Talcott is entitled to receive a reasonable compensation for the services performed and the expenses incurred by him for superin-

COMPENSATION (*Continued.*)

- tending the Springfield armory, whilst he was in command of the Watervliet arsenal; but not as superintendent of said armory whilst there was a regular superintendent in office. *Col. Talcott's case*, 50.
5. In order to entitle a captain to the annual pay of four thousand dollars per annum, given by the act of 3d March, 1835, he must be in actual command of a squadron on a foreign station. *Advice*, 81.
 6. To entitle a brevet brigadier general to pay according to his brevet rank, he must be in command of a brigade regularly consisting of two regiments. *Gen. Armistead's case*, 83.
 7. The act of April 16, 1818, has excluded officers of the Ordnance Department from the benefits of their brevet rank. *Major Baker's case*, 83.
 8. The extra compensation and allowances given by the regulations in force at the time of the passage of the act of the 3d of March, 1835, were authorized by law. *Major Dade's case*, 84.
 9. The eighth section of the act of the 2d of March, 1821, was enacted as a permanent provision; and as it has never been repealed nor abrogated, is yet in force. *Ibid.*
 10. The payment of army contingencies is authorized by law; and, as Congress have not defined in the law itself what those contingencies are, the Secretary of War must be admitted to possess a very liberal discretion on the subject. *Ibid.*
 11. If the allowances made by the Secretary of War prior to the 3d of March, 1835, to officers of the army, from the appropriation for army contingencies, were really for contingencies, they were authorized by law. *Ibid.*
 12. A captain stricken from the rolls of the army, and afterwards reinstated by and with the advice of the Senate, cannot claim pay after reinstatement only from the date of his acceptance of the new commission. *Capt. Bonneville's case*, 105.
 13. A quartermaster sergeant acting as a clerk in the office of the quartermaster of the marine corps is entitled to the additional compensation of fifteen cents per day allowed by the act of March 2, 1819, and paid to the sergeant acting as clerk in the office of the Quartermaster General of the army. *Quartermaster Sergeant Devlin's case*, 116.
 14. Promoted officers of the navy, whose commissions fix dates of rank anterior to the dates of the commissions, are entitled to the increased pay from the date to which their appointments were carried back, provided they were immediately in the performance of duties compatible with the grade to which they were elevated by their promotions. *Lieut. Poor's case*, 124.
 15. The additional compensation of ten dollars per month allowed to captains of the army for their duties and responsibilities in respect to the clothing, arms, and accoutrements of companies, by the act of the 2d of March, 1827, may be claimed by all captains of volunteers or militia, embraced in the act of the 19th of March, 1836, who performed any duty, or were charged with any responsibility, with respect to the clothing, arms, or accoutrements, or with respect to either of these articles, belonging to their companies. *Advice*, 136.
 16. The word "compensation" occurring in the law, is synonymous with "pay" or "salary," and does not include rations. The act, therefore, does not include the double rations heretofore allowed by the regulations. *Paymaster Andrews' case*, 152.
 17. The proviso of the act of the 3d March, 1835, inhibiting the payment of percentage to officers of the army for any service or duty, unless authorized by law, is a permanent provision, and cannot be avoided except by an express enactment; wherefore, a commission cannot now be allowed to Paymaster Kirby on moneys paid out by him to the militia and volunteers serving in Florida. *Paymaster Kirby's case*, 153.
 18. The salaries of judicial and other officers appointed for the Territory of Michigan are to be paid until the State shall have been actually admitted into the Union by the proclamation of the President. *Advice*, 170.

COMPENSATION (*Continued.*)

19. The clerks and messengers of the Pension Office authorized by the act of the 9th May, 1836, are entitled to the increase of salaries provided by the enacting clause of the third section of the act of the 3d March, 1837. *Advice*, 181.
20. The salaries of three clerks only in the General Land Office were fixed in the act reorganizing it. All the residue, including the messengers, are entitled to the per-centage granted by the act of 3d March, 1837. *Advice*, 193.
21. The date of the written acknowledgment of the receipt of the order expressing a readiness to obey it, where such written acknowledgment is transmitted by the surgeon, is the day from which the increased pay under the act of 3d March, 1835, is to commence. *Surgeon Dillard's case*, 198.
22. There is no provision of law which authorizes the employment of persons for clerks to paymasters other than non-commissioned officers; yet the department, in the exercise of its general powers, may allow a private citizen to be employed when no capable non-commissioned officer can be obtained. *Advice*, 242.
23. The department may take the highest pay allowed by the laws now in force to any non-commissioned officer of the corps to which the person employed as paymaster's clerk belongs as the standard of compensation, and may allow him double the same. *Ibid.*
24. The clerk of the navy and privateer pension and navy hospital funds is entitled, over and above his salary, to a fair compensation for services performed by him in respect to the United States coast survey, as those services were no part of his official duty. *Ragsdale's case*, 245.
25. The reference to the fees of the State courts, contained in the acts of 1789 and of 1799, does not apply to the courts nor to the district attorneys of States where there are no fees by law, but refers to those where the laws give taxable fees. *Baker's case*, 252.
26. The United States should, in such cases, make a reasonable allowance to their attorneys in the States where the latter can look only to their employers for compensation. *Ibid.*
27. The acting quartermaster general is entitled to receive the pay and emoluments of quartermaster general during the period of his service in that capacity, where the office is really or effectually vacant. *Major Cross' case*, 261.
28. By the application of the act of the 2d of March, 1827, to the marine corps, an assistant quartermaster of marines was entitled, prior to the 30th of June, 1834, to all the extra pay and emoluments and allowances allowed to an assistant quartermaster in the army similarly situated. *Capt. Nicholson's case*, 265.
29. The owners of vessels chartered for the purpose of transporting Indians from Florida, but not employed for that purpose, are legally entitled to the stipulated demurrage and the actual damage occasioned by the non-fulfilment of the contracts. *Advice*, 280.
30. The first and second classes of Indian reserves provided for in the thirteenth article of the treaty of December, 1835, with the Cherokees, are entitled to compensation in money in lieu of their interests, notwithstanding the supplementary articles concluded after the refusal of the President to allow pre-emptions. *Advice*, 297, 304.
31. In respect to the third class there is no doubt; yet the Attorney General, on the whole, concludes that the reserves of that class are also entitled, individually, to compensation in money. *Ibid.*
32. The compensation to the first and second classes must be paid by the United States, not out of the supplementary fund; but that to the third class must be paid from the \$600,000 set apart in the supplementary articles. *Ibid.*
33. The assistant surgeon is entitled to the pay of a surgeon whenever he is called to discharge the peculiar duties of a surgeon; but those duties must be such as can only be performed by him when present. *Advice*, 308.
34. The accounts of marshals certified by the court, or one of the judges thereof,

COMPENSATION (*Continued.*)

- as provided in the fourth section of the act of May 8, 1792, are conclusive upon the accounting officers of the treasury, except in cases where charges shall be allowed by the court or judge for a service or purpose not mentioned in the acts of Congress, and where a greater sum shall be allowed than that fixed by law. *Case of the marshal of the Southern District of New York*, 316.
35. As to whether a charge of two dollars for serving a writ of subpoena is proper, it is not perceived that there is any legal warrant for excepting it from the enacting words of the statute giving that compensation for the service of any process, &c. *Ibid.*
 36. The account of the marshal of the District of Columbia, for extra allowances to government witnesses on the trial for the burning of the treasury buildings, made by the circuit court, and certified, cannot be legally paid, notwithstanding the certificate, for the reason that no act of Congress authorizes payment of charges for such a purpose. *Case of the marshal of the District of Columbia*, 318.
 37. The distinction between this and the preceding case is, that here the service is not, whilst there it was, authorized by law. The two opinions read together clearly define the views of the Attorney General upon the subject of the efficacy and legal bearing of the certificate of the court upon the accounts of marshals. *Ibid.*
 38. Officers thereunto authorized, commanding in a corps of militia or volunteers in the actual service of the United States in a grade higher than their rank in the army, are equitably entitled to the pay and emoluments of the grade in which they serve, and may be paid out of the appropriation for the pay of militia and volunteers. *Advice*, 323.
 39. The same result may be produced by allowing it out of the army appropriation, and allowing the difference between that and the grade in which they serve. *Ibid.*
 40. Clerks, whose ordinary duties are prescribed by law, or by the head of the bureau in which they are employed under the authority of law, who perform services additional to those which are in their line of ordinary duty, are equitably entitled to a just compensation therefor. *Hunter's case*, 324.
 41. Services thus rendered the government must be regarded as wholly extra-official. *Ibid.*
 42. Clerks in the Fourth Auditor's office are entitled to a fair compensation for services performed by them in relation to the navy pension and navy hospital funds, provided those services are not within the range of the powers and duties assigned by law to the office of the Fourth Auditor. *Hunter's case*, 329.
 43. The same rule for ascertaining whether services were extra official, as was laid down in the opinion given on the 6th of April, 1838, should be applied. *Ibid.*
 44. An officer who, in point of fact, temporarily performs the duties belonging to an officer of higher grade, is entitled to the compensation allowed to such higher grade, even though his appointment may not have conformed in all respects to the requirements of the regulations. *Wood's case*, 337.
 45. A captain, entitled to keep three horses only, can only draw forage in kind, or claim an equivalent in money, for that number; and if he draw for horses belonging to the United States, it must be deducted from that number. *Capt. Fowler's case*, 340.
 46. The actual command of any number of men sufficiently large to constitute, according to the usage of the Navy Department, a detachment of marines, entitles the commander to the compensation given in the 2d section of the act of March 2, 1827. *Advice*, 342.
 47. The accounting officers of the treasury may allow an account, if it be a just one, of Charles J. Ingersoll, district attorney of the eastern district of Pennsylvania, notwithstanding his having been sued by the United States for various bonds placed in his hands for collection, for moneys received thereon,

COMPENSATION (*Continued.*)

- and for other moneys, (his account not having been set off in the suit,) and a judgment recovered by the United States against him for \$3,975 78, the same as if it were presented prior to the institution of that suit, as the said account was a matter separate and distinct from the subject-matter of the suit, and a set-off not having been required to be made. *Ingersoll's case*, 345.
48. The secretary of the commander of the surveying and exploring expedition has no legal right to compensation for services rendered anterior to the appointment of the commander and the receipt of formal notice of his appointment as secretary; yet if he actually rendered services in respect to that expedition before, and in the judgment of the President has an equitable claim, he may be paid out of the appropriation of 1836, for the expedition, without sending the claim to Congress. *Reynold's case*, 357.
 49. The two clerks in the bureau of Indian Affairs are not entitled to the additional compensation asked for, under the third section of the act of 3d March, 1837. *Advice*, 381.
 50. The expenses incurred in prosecuting for and obtaining the legacy bequeathed to the United States by James Smithson, and for transporting the same to this country, ought to be defrayed out of the appropriation made by Congress. *Advice*, 383.
 51. The claim of General Scott for a compensation of eight dollars per day over and above his regular pay as major general, for superintending the removal of the Cherokees under the direction of the Secretary of War, cannot be allowed without violating the proviso to the act of 3d March, 1835. *Gen. Scott's case*, 395.
 52. The claim of General Scott for compensation, at a rate of eight dollars per day over and above his regular salary, for arranging and superintending the removal of the Cherokees, even though he were a special commissioner to effect that object, cannot properly be allowed. *Gen. Scott's case*, 416.
 53. Clerks and others holding regular appointments to places created, and receiving specific salaries affixed thereto by law, are not entitled to additional allowances for services rendered the government as the agent for surveying and selling Indian lands, the same being prohibited by acts of Congress. *Advice*, 422.
 54. Extra compensation to persons entitled to salaries may be allowed only where money shall have been appropriated for the particular services, for the rendition of which it is claimed as a compensation. *Advice*, 439.
 55. In a case of a general appropriation of a sum of money for the accomplishment of a particular object, no part of it can be paid to a person receiving an annual salary, unless the services rendered are directed to be paid for by the act. *Ibid.*
 56. By the acquiescence of the government, and the construction given in several judicial decisions, entitled to respect, the act of the 7th of May, 1822, in relation to the compensation of officers of the customs, is not deemed to work a repeal of the act of the 2d of March, 1799, in relation to the same subject. *Henshaw's case*, 449.
 57. It is inexpedient for accounting officers in any case, unless thereunto specially directed by act of Congress, to re-adjudicate upon the items of an account once considered and settled in their offices. *McCall's case*, 461.
 58. If the practice be allowed, the experiment will be made upon every change of accounting officers, by persevering claimants who may imagine themselves entitled to more than they have been allowed, to procure a reconsideration and revision of former decisions; and the same would be likely to result disadvantageously to the government. *Ibid.*
 59. The chief messenger in the Treasury Department is not entitled to compensation over and above his salary, for carrying the mails of the several offices occupying the southeast executive building, to and from the post office; but, if he be required to furnish a horse for that duty, a reasonable compensation for that should be allowed. *Advice*, 473.
 60. Nor are watchmen entitled to extra compensation for labor performed in the offices during the day. *Ibid.*

COMPENSATION (*Continued.*)

61. Agents for paying pensions are entitled to have their necessary contingent expenses allowed, notwithstanding the act of April 20, 1836; as the prohibitions of that act may be well satisfied by stopping payment of the two per centum commissions which had been theretofore allowed for disbursing pension moneys. *Cases of King & Lowe*, 481.
62. Where proposals, in the usual form, for the transportation of the mail between certain specified points, had been advertised and accepted without certain knowledge, on either side, that the condition of the roads was such that coaches could pass over the route, and, after trial, it was found that they were not such as to permit the execution of said contract, according to its terms—DECISION, that the contractor be released from further obligations under it, and that he receive compensation for transporting the mail by steamboat, &c. *Toby's case*, 492.
63. Where a marshal received, in due course of law, process of summons and subpoena for the same witnesses, (it being the usual mode of procuring the attendance of witnesses in the court from which they issued,) and served the same as required, he is entitled to his fees for both services, on their being allowed and certified by the district judge. *Waddell's case*, 497.
64. Marshals have no control over the practice of the courts, nor over the kind of process which they may issue; they are simply bound, as officers of the courts, to execute the process issued to them. *Ibid.*
65. In a matter of general and established practice, the regular taxation of the costs, and their allowance in due form by district judges, are binding and conclusive upon the accounting officers. *Ibid.*
66. There cannot be properly allowed but one compensation, for the same period, to the individual appointed under the act of 30th June, 1834; a superintendent of Indian emigration at a stipulated salary, and afterwards a commissioner to negotiate a treaty with the Miamies. *Col. Pepper's case*, 511.
67. District attorneys are not entitled to any compensation over and above their annual salary and stated fees for any services whatever rendered by them as such officers in the prosecution of offenders. *Case of District Attorney of Indiana*, 515.
68. But where, under special instructions, district attorneys render services of various sorts, necessary to discover criminals and in procuring adequate evidence, for such services they may be allowed an adequate compensation by the proper department. *Ibid.*
69. Since the 3d of March, 1835, quartermasters have not been allowed any extra compensation on account of disbursements for public supplies. *Major Weed's case*, 516.
70. Where it is the settled practice of the court to procure the attendance of witnesses by the service both of the process of summons and subpoena, and an order issues to the marshal to summon witnesses, that officer is entitled to an allowance of fifty cents for performing the order, and the stated compensation for serving the summons and subpoena. He cannot disregard the orders or process issued by the court, even though they are superfluous; but must execute such as shall be issued to him in the ordinary practice, and for which he is entitled to the prescribed fees at the hands of the government. *Case of the Marshal of the Southern District of New York*, 536.
71. The taxation of the court, and the allowance and certificate of the judge, are conclusive upon the accounting officers when the service or purpose is enumerated in the act of Congress, and the sum allowed therefor is not exceeded. *Ibid.*
72. The marshal cannot be allowed more for the service of a summons, where a subpoena and summons shall have been issued to him to obtain the attendance of a single witness, than the sum prescribed for summoning a single witness. *Ibid.*
73. The acts of 3d March, 1825, and 2d July, 1836, do not authorize the payment of additional compensation to contractors for transporting the mail in cases where the time of the transit only is changed, even though additional

COMPENSATION (*Continued.*)

- conveyances shall be required, but where the mail is carried between the same *termini* no oftener, and there is no increase of expedition on the route. *Advice*, 542.
74. The act of 2d July, 1836, provides for the manner in which changes are to be made in the terms of any existing contract, other than those having reference to additional service or increase of expedition. *Ibid.*
 75. The compensation of teamsters, &c., in the Florida service, was not provided for in the act of 1819, providing pay for fatigue duty in the regular army, but has been provided for specially by Congress, and may be made to the volunteers selected for that service, with the approbation of the commanding general. *Advice*, 550.
 76. Contractors for the removal of the Chickasaws to their new homes must be paid from the appropriation of the Chickasaw fund made by the act of the 20th of April, 1836, even though some of the Indians did not avail themselves of the means furnished to remove them. *Buckner's case*, 561.
 77. Where collectors, naval officers, and surveyors, are required by the Secretary of the Treasury to perform services which are unconnected with their official duties, the necessary expenses actually incurred in the performance of those extra duties may be allowed them. *Advice*, 563.
 78. Company officers only are entitled to the forty cents a day provided by the 2d section of the act of 19th March, 1836. *Advice*, 566.
 79. The United States are liable to clerks of circuit courts for their fees properly chargeable to plaintiffs, in suits in which the United States are plaintiffs; and the accounting officers may allow them, even though marshals may have collected them of defendants and neglected to pay them over. *Advice*, 575.
 80. The compensation of officers of the customs is to be regulated and graduated by the importations of the present year; the act of July 21, 1840, merely substituting the present for the year 1838. *Advice*, 587.
 81. Navy agents employed to make purchases, or to perform any services for a department other than the Navy Department, are not entitled to extra compensation unless compensation for the extra services is expressly authorized by law. *Advice*, 588.
 82. Extra compensation to the judge of the superior court at St. Augustine, for examining and adjudging certain cases of claims, cannot be allowed, as there is no appropriation for the services, and no provision for their payment, in that act requiring them. *Advice*, 589.
 83. The district attorney for the District of Columbia is entitled to a reasonable compensation, over and above his salary and stated fees, for attending, on the part of the United States, during the taking of certain depositions in said District in a case depending in the circuit court of Missouri. *Case of the District Attorney of the District of Columbia*, 599.
 84. The district attorney of Vermont is entitled to an allowance for expenses incurred in numerous journeys; undertaken, with the approbation of the Solicitor of the Treasury, for the purpose of securing certain payments due to the United States, and a further allowance for compensation in superintending the sale of certain real estate in Vermont. *Kellogg's case* 612.
 85. Clerks in the office of the Secretary of War are not entitled to extra compensation for attending to the business connected with the reservations under the Creek treaty of March 24, 1832. *Mix's case*, 621.
 86. The provisions for the regulation of the fees and compensation of certain clerks, attorneys, counsellors, and marshals, in the district courts of the United States, contained in the act making appropriations for the civil and diplomatic expenses of the government for the year 1841, was designed to reduce the fees of the federal officers whose compensation by existing laws exceeds \$1,500 per year, to the scale of fees allowed by law for similar services in the highest State courts. *Hoffman's case*, 627.
 87. To give effect to this provision the several officers embraced within it should ascertain, as far as practicable, whether all the fees, emoluments, and receipts of their office, as allowed under anterior laws, will make their en-

COMPENSATION (*Continued.*)

- ture compensation exceed the sum of \$1,500 per annum; and if it be reasonably certain that they will, the officer must be confined in his charges to the rates of fees prescribed by the proviso. If they will not, or if the question be fairly doubtful, the old rule may be adhered to. *Ibid.*
88. Clerks are not responsible to the treasury for fees which, after using due diligence, they have failed to collect. *Ibid.*
89. A lieutenant having written a letter to the Secretary of War, which, though not intended as such, was considered a resignation by that department, and the writer accordingly dropped from the rolls, but afterwards restored by the President to his station and rank, is entitled to be paid as lieutenant during the time he was kept out of the service. *Lieut. Drane's case*, 641.
90. The act of the 3d of March, 1841, making appropriations for the civil and diplomatic expenses of the government for the year 1841, was intended to restrain the incomes or annual emoluments of the officers therein mentioned as such, from all sources whatever connected with the performance of the duties of their office, to the sums therein mentioned. *Adrice*, 658.
91. Whether the allowance for agency of marine hospitals, superintendence of light-houses, and certificates for wines and teas, are fairly included within the purview of the statute, depends on the question whether these objects come within the sphere of the collector's duty, &c. *Ibid.*
92. The sixth section of the act of 1789 provides that the compensation which shall be due to the members and officers of the Senate shall be certified by the President thereof, and the same shall be passed as public accounts and paid out of the treasury; and the certificate of the President, which is the presumed act of the Senate, is conclusive upon the matter as between that body and the accounting officers. *Evans's case*, 662.
93. The government is not bound to pay such of the Florida militia as disbanded voluntarily, and without authority, and refused to render service. *Adrice*, 687.
94. Nor is the government bound to pay such as were mustered, and then directed to repair to their homes, to remain in readiness to serve at a moment's notice. *Ibid.*
95. The disbanding was a virtual discharge from actual service; and, during such discharge, they were not entitled to pay as soldiers of the United States. *Ibid.*

COMMUTATION.

1. Every volunteer mustered into service under the act is entitled at once, and in one payment, to receive, in money, a sum equal to the full cost of the clothing of a non-commissioned officer or private, as the case may be, in the regular troops of the United States, without reference to the time for which he may be kept in service. *Adrice*, 159.
2. Volunteers, whether for six or twelve months, are entitled to the cost of all those articles which are required to clothe a soldier in the army of the United States on his entrance into service; for a year if he shall be enlisted for a year—for six months if that be his term. *Ibid.*

CONSULS.

1. Where the American consul at Havana, to whom an American brig reported herself, suspected her papers to be fraudulent, and not such as to entitle her to the protection which belongs to vessels sailing under the American flag, and ordered the commander of a ship-of-war lying at that port to seize and detain her until the government could be advised of the facts and direct as to the course to be adopted; and a correspondence having ensued between said consul and the Captain General of Cuba, disposing of the question of the violation of the sovereignty of Spain, in making the seizure in the port of Havana; and the question under the several navigation acts, and the laws to prohibit the slave trade, being presented as to the legality of the seizure, and the course to be pursued under the circumstances—DECIDED, that, whenever there is just cause to believe that any merchant vessel is engaged in an

CONSULS (*Continued.*)

illicit trade, a public vessel has the right to detain her until our government can act upon the subject; and that the question of the violation of the sovereignty of any foreign government in no wise affects the question in respect to the liability of the suspected vessel to seizure under such circumstances. *Advice*, 405.

2. Although the laws turn out to be improvident for the punishment of just this species of fraud, it was competent for the consul to give the order, and for the public vessel to make the seizure and detention—nevertheless, without further proof that the vessel was engaged or arranged to be engaged in the slave-trade, further proceedings should not be taken on the premises. *Ibid.*
3. Seamen on board vessels of war are not entitled to pecuniary assistance from consuls abroad, under the act of 28th February, 1803. *Advice*, 683.
4. The moneys in the hands of the Secretary of State were raised from the wages of merchant seamen only, and should be applied only for the relief of that class of seamen which have contributed to the fund. *Ibid.*
5. Seamen on board ships-of-war are not entitled to pecuniary assistance from consuls under the acts of 1792 and 1803. *Advice*, 685.

CONTRACTS.

1. Contracts to carry the mail of the United States, without stipulation as to its weight, include the whole mail accruing between the *termini* named therein, or coming into it from other routes, according to the arrangement contemplated when they are made; and, if justice shall demand extra allowance on account of the increased weight, it must be sought of Congress, and not of the Postmaster General. *Case of Stockton & Stokes*, 1.
2. If a contractor for furnishing supplies for the army gives an order upon the packers for pork, and the same have been prepared and designated by the vender, the subsequent risk of the same is upon the government. *Case of Hubbard & Co.*, 115.
3. Where a contractor for work on the Cumberland road in Ohio, made a claim to the Secretary of War for extra labor performed, and the latter submitted it to Congress, who made an appropriation for the precise amount—*DECIDED*, that there can be no valid objection to the payment thereof. *Early's case*, 168.
4. The owners of vessels chartered for the purpose of transporting Indians from Florida, but not employed for that purpose, are legally entitled to the stipulated demurrage and the actual damage sustained by the non-fulfilment of the contract. *Advice*, 280.
5. The United States are bound, as well by contract as by the universal usage of civilized nations, to perfect the title of the heirs of Thomas F. Reddick to a tract of land on the bank of the Mississippi. *Case of the heirs of Reddick*, 398.
6. The Cherokee fund is not liable for damages arising from the non-fulfilment by the government of contracts made for the removal of, and supplies for, the Cherokee Indians. *Advice*, 431.
7. Where one of two or more contractors for transporting the United States mail shall have been guilty of a violation of the twenty-eighth section of the act of the 2d July, 1836, changing the organization of the Post Office Department, and providing more effectually for the settlement of the accounts thereof, the Postmaster General may annul the contract and relet the route according to law. *Advice*, 436.
8. All purchases and contracts made by the Navy Department should be under the direction of the Secretary of the Navy. *Advice*, 437.
9. Where the public exigencies do not require the immediate delivery of the article or performance of the service, in such cases it is necessary previously to advertise for proposals respecting the same, unless the article be a steam-boat or some similar structure. *Ibid.*
10. Where immediate delivery is necessary to the wants of the public service, the article required must be obtained by open purchase. *Ibid.*
11. Where proposals, in the usual form, for the transportation of the mail between

CONTRACTS (*Continued.*)

- certain specified points, had been advertised and accepted without certain knowledge, on either side, that the condition of the roads was such that coaches could pass over the route, and, after trial, it was found that they were not such as to permit the execution of said contract, according to its terms—*DECIDED*, that the contractor be released from further obligations under it, and that he receive compensation for transporting the mail by steamboat, &c. *Toby's case*, 492.
12. Where a contractor for army supplies agreed to furnish for the army, upon the requisition of the commandant, a supply of provisions for six months in advance, at Detroit, and for nine months at Mackinac, and was required by the commanding officer to deposit more rations than were required for six months' supply of the troops stationed at Detroit, and ten per centum in addition for contingencies; and the question of the rate of compensation for the excess having been passed upon by a court, and the matter sent to the accounting officers to be adjusted on principles of justice and equity, by an act of Congress requiring them to recognise the judicial decision—*DECIDED*, that the contractor must be held to supply at his contract price the amount necessary for six months' supply at Detroit, and nine months' supply at Mackinac, and ten per centum besides for contingencies, and no more, and that for the excess he should be allowed the fair market value. *Colonel Thomas's case*, 525.
 13. The acts of 3d March, 1825, and 2d July, 1836, do not authorize the payment of additional compensation to contractors for transporting the mail in cases where the time of the transit only is changed, even though additional conveyances shall be required, but where the mail is carried between the same *termini* no oftener, and there is no increase of expedition on the route. *Advice*, 543.
 14. The act of 2d July, 1836, provides for the manner in which changes are to be made in the terms of any existing contract, other than those having reference to additional service or increase of expedition. *Ibid.*
 15. Contractors for the removal of the Chickasaws to their new home must be paid from the appropriation of the Chickasaw fund made by the act of the 20th April, 1836. *Bucknor's case*, 561.
 16. Neglect of the officers and agents of government to give a contractor for rations, to be furnished the Creek Indians, due notice of an unexpected large number of them to be removed, and supplied with rations at an unreasonable period of the year, is sufficient to excuse the non performance of the contract, and to protect the contractor from damages. *Mackay's case*, 633.
 17. Payment for rations furnished before the contract was abandoned by the contractor, ought not to be withheld by the government on account of such non-performance. *Ibid.*

COURTS OF JUDICATURE.

See JUDICIARY.

COURTS MARTIAL.

1. Judges advocate of courts-martial are required to be sworn; and where the proceedings of such courts do not show that they were, it may be properly considered that the fact does not exist, and that they were not sworn, and that, therefore, the proceedings were irregular and void. *Clark's case*, 397.
2. The accused may be put upon another trial; but not before the same officers who constituted the first court. *Ibid.*
3. It is a fatal error in proceedings before courts-martial for the president to omit to administer an oath or affirmation to the judge advocate before proceeding to trial. *Guthrie's case*, 544.
4. It is error in proceedings before courts-martial to receive evidence after the court has been cleared for deliberation. *Smith's case*, 545.
5. In the case under consideration, where the jurisdiction of the court was called into question on account of the early date of the enlistment, the record ought to have contained authentic evidence of the terms and period of the

COURTS MARTIAL (*Continued.*)

- enlistment, that the revising officer might judge whether or not the court had jurisdiction. *Ibid.*
6. It is not sufficient to return the inferences or conclusions of courts-martial, nor mere statements of the evidence, or books or papers inspected; but the evidence itself on which they based their judgment must be returned. *Ibid.*
 7. It is improper for the revising authority to make any decision in regard to the effect of a certain act of Congress, in cases where the record is so defective. *Ibid.*
 8. Where a naval court-martial tried a master-at-arms for desertion, on a charge headed with a caption styling the accused "master-at-arms," and discharged him on the ground that since his arrest he had not been borne on the ship's book's as such, and that the charge could not at that stage of the trial be revised—*HELD*, that the decision was erroneous, and that those grounds were insufficient to deter the court from proceeding to judgment on the merits. *Palmer's case*, 548.
 9. The sentence pronounced by the court martial in the case of Lieutenant Whitney is not illegal nor unconstitutional, but it is, under the circumstances, severe and harsh. *Lieut. Whitney's case*, 631.
 10. There is no doubt of the competency of the evidence of the prosecutor before a court-martial: but how far his credibility may be affected by the relation in which he stands towards the accused, is a question of discretion for the court itself. *Lindsay's case*, 714.
 11. The prosecutor may, after giving evidence, remain in court to conduct the prosecution. *Ibid.*
 12. The plea of *autrefois acquit*, averring a former trial and acquittal for manslaughter in the supreme court of a State, and that said charge was sustained only by the same evidence as must be used to sustain the charge for violating the eighty-eighth article of the Rules and Articles of War, is not a bar to the proceedings to punish unofficer-like and ungentlemanlike conduct. *Advice*, 749.
 13. Whether, under the eighty-eighth article of the Rules and Articles of War, the accused can be brought to trial before the court-martial which, two years before, had issued an order for his trial, and suspended its execution under peculiar circumstances, *quere*. *Ibid.*

CURRENCY.

1. The act designating and limiting the funds receivable for the revenues of the United States forbids the receipt of any bank notes except of such specie-paying banks as shall from time to time conform to certain conditions therein mentioned in regard to small bills, and restrains the Secretary of the Treasury from making any discrimination in this respect between the different branches of the public revenue. *Advice*, 172.
2. It leaves to the Secretary of the Treasury power to prohibit the receipt of particular notes, provided his prohibition apply to both lands and duties, and to direct what particular notes allowed by law shall be received, provided he can find a deposit bank which will agree to receive and credit them as cash, and not otherwise. *Ibid.*
3. The deposit banks are the sole judges of the notes to be received by them from any collector or receiver of public money, and are not bound to receive the notes of any other bank whose notes they may choose to reject; provided they apply the same rule to the United States which they apply to their other depositors. *Ibid.*

CUSTOMS.

1. Sureties of a delinquent or defaulting principal obligor in a custom-house bond are not liable to detention of moneys due them—the phrase "who is in arrears to the United States," contained in the act of 25th January, 1828, applying only to persons who, having previous transactions of a pecuniary nature with the government, are found upon the settlement of those transactions to be in arrears. *Herring's case*, 52.

CUSTOMS (*Continued.*)

2. The United States have the right to retain moneys awarded under the French treaty of 1831 to a firm, of which one member is indebted to the government upon a bond for duties on goods imported for the firm, and to apply the same upon the bonds. *Hollins & McBlair*, 163.
3. After a fine has been imposed by a collector of customs for a violation of the revenue laws, and collected and distributed under the acts of March 3, 1797, and July 14, 1832, or either of them, the Secretary of the Treasury is not authorized to remit it. *Pease's case*, 237.
4. Moneys collected for customs and deposited to the credit of the treasury, but not actually brought into the treasury by covering warrants, are not so blended with the moneys in the treasury as to require a special appropriation by law in order to apply them to the payment of current expenses, but may be applied as if they had been retained in the hands of the collectors. *Advice*, 244.
5. The Solicitor of the Treasury may grant indulgences upon custom-house bonds, in the form of instructions to district attorneys who shall have received them for prosecution, in such cases and on such terms as shall be deemed advantageous to the United States. *Advice*, 247.
6. And, although the Solicitor has no jurisdiction of bonds until they are placed in the hands of district attorneys, he may, in proper cases, give the instructions conditionally in advance, as to the course to be pursued. *Ibid.*
7. The collector of customs ought not to refuse payment of a debenture certificate, and in lieu thereof give credit on the extended bond where the party to whom the certificate may have been issued; received an extension of payment on bonds given to secure the duties on a subsequent importation of goods; nor where the certificate came into possession of the party by endorsement or assignment. *Advice*, 279.
8. It is not a breach of official duty on the part of collectors to refuse to report their reasons for removing their subordinate officers. *Advice*, 325.
9. By analogy to the power of removal exercised by the President, collectors may remove their subordinates without consulting the Secretary of the Treasury, though the approbation of the latter be necessary to an appointment. *Ibid.*
10. It is competent for the surveyor of a port to depute inspectors of the customs appointed by the collector of customs at the same port, with the approbation of the Secretary of the Treasury, to act as markers. *Advice*, 331.
11. The act of 2d March, 1833, to modify the act of July 14, 1832, and other acts admitting silks, did not repeal the act of 14th July, 1832, and former acts, which impose duties on millinery, hosiery, and ready-made clothing; and those articles, of whatever material composed, are subject to duties. *Advice*, 374.
12. The operation of the revenue laws cannot be legally suspended by the Comptroller, even though goods may have been ordered in view of an erroneous practice, and the importers wish to countermand their orders from abroad. *Ibid.*
13. It is the duty of collectors of customs to pay the duties collected by them into the treasury, although some of them may have been paid under protest, and importers shall have prosecuted to recover them back. *Advice*, 392.
14. Where judgments shall be obtained against the collectors for overcharges of duties, the government ought to discharge them and relieve collectors of the consequences thereof. *Ibid.*
15. Collectors should adjust the duties with importers at the time of the importation, and not leave them unascertained for any considerable time, as the practice will be pernicious in its consequences. *Ibid.*
16. By the acquiescence of the government, and the construction given in several judicial decisions, entitled to respect, the act of the 7th of May, 1822, in relation to the compensation of officers of the customs, is not deemed to work a repeal of the act of the 2d of March, 1799, in relation to the same subject. *Henshaw's case*, 449.

CUSTOMS (*Continued.*)

17. The tariff act of 2d March, 1833, provides that all articles of manufacture which may be ascertained to be worsted shawls, worsted stuff goods, or composed of silk and worsted, shall be admitted free of duty. *Advice*, 460.
18. Where collectors, naval officers, and surveyors, are required by the Secretary of the Treasury to perform services which are unconnected with their official duties, the necessary expenses actually incurred in the performance of those extra duties may be allowed them. *Advice*, 563.
19. The Secretary of the Treasury has no power, under any law now existing, to refund moneys deposited for duties with a collector, but which are ultimately found to exceed the amount of duties properly chargeable. *Advice*, 583.
20. Collectors are not required to give bonds in a larger amount than before under the act of July 4, 1840, unless it shall be deemed necessary by the proper officers of the department; but they are required to give new bonds with new conditions embracing new duties devolved upon them, as well as those previously required. *Advice*, 586.
21. The compensation of officers of the customs ought to be regulated and graduated by the importations of the present year; the act of July 21, 1840, merely substituting the present for the year 1838. *Advice*, 587.
22. Under the act of July 3, 1840, all collectors of customs are required to execute bonds embracing, in terms, the new duties to which they are or may be subject. *Advice*, 600.
23. Even at ports where there is a receiver general, there are some new and increased fiscal duties imposed on the collector which did not previously belong to him. *Ibid.*
24. If the proper department shall deem it expedient, it may, in lieu of a new bond, embracing all the duties of the collector, take a new bond in a suitable penalty, embracing the new duties only, leaving the old one outstanding. *Ibid.*
25. Collectors of customs are required to execute new bonds embracing the new duties imposed on them by the act of 4th July, 1840. *Advice*, 610.
26. The act requires all collectors of customs to safely keep, without loaning or using, all the public money collected by them, or otherwise at any time placed in their possession or custody, till the same is ordered by the proper department to be transferred or paid out, except as therein particularly provided; and although he is required to pay it over, the character of his responsibilities and his duties is changed, even though there be no increase of money on his hands. *Ibid.*
27. Duties erroneously paid under protest, and accounted for by the collector, cannot be refunded by the Treasury Department without previous legislative sanction. *Advice*, 613.
28. The liabilities consequent upon a re appointment to an office already held, do not commence until the term commences for which such re appointment is made. *Trick's case*, 626.
29. The act of the 3d of March, 1841, making appropriations for the civil and diplomatic expenses of the government for the year 1841, was intended to restrain the incomes or annual emoluments of the officers therein mentioned as such, from all sources whatever connected with the performance of the duties of their office, to the sums therein mentioned. *Advice*, 658.
30. Whether the allowances for agency of marine hospitals, superintendence of light houses, and certificates for wines and teas, are fairly included within the purview of the statute, depends on the question whether these objects come within the sphere of the collector's duty, &c. *Ibid.*

DAMAGES.

See CLAIMS.

DISCHARGES.

1. Where judgments shall be obtained against the collectors for overcharges of duties, the government ought to discharge them and relieve collectors of the consequences thereof. *Advice*, 392.

DISCHARGES (*Continued.*)

2. Where imprisoned debtors are discharged on payment of costs, it is to be inferred that the condition embraced only the costs of suit in the cases in which they were imprisoned. *Advice*, 614.

DISTRICT ATTORNEYS.

1. District attorneys are entitled only to the salary allowed by the act of 1799 and by subsequent laws, and the per diem, mileage, and taxable fees for prosecuting before the federal courts in their respective districts delinquents for crimes and civil actions in which the United States are concerned, or have an interest, cognizable therein, unless some further special provision shall have been made by Congress for individual officers. *Case of Baker & Desereaux*, 45.
2. Not being required by the laws defining their general duties to attend State courts, nor upon judges out of court, if their services are called for therein, or on other special occasions, and the fees taxed them in such State courts cannot be recovered, or are inadequate, they should be paid a fair compensation out of any moneys appropriated to the special objects in reference to which the services were rendered, or, in some cases, out of the judiciary fund usually provided in the general appropriation bill. *Ibid.*
3. The reference to the fees of the State courts, contained in the acts of 1789 and of 1799, does not apply to the courts nor the district attorneys of States where there are no fees by law, but refers to those where the laws give taxable fees. *Baker's case*, 252.
4. The United States should, in such cases, make a reasonable allowance to their attorneys in the States where the latter can look only to their employers for compensation. *Ibid.*
5. District attorneys are not entitled to any compensation over and above their annual salary and stated fees for any services whatever rendered by them as such officers in the prosecution of offenders. *Case of District Attorney of Indiana*, 515.
6. But where, under special instructions, district attorneys render services of various sorts, necessary to discover criminals and in procuring adequate evidence, for such services they may be allowed an adequate compensation by the proper department. *Ibid.*
7. The district attorney for the District of Columbia is entitled to a reasonable compensation, over and above his salary and stated fees, for attending, on the part of the United States, during the taking of certain depositions in said District in a case depending in the circuit court of Missouri. *Case of the District Attorney of Missouri*, 599.
8. The district attorney of Vermont is entitled to an allowance for expenses incurred in numerous journeys, undertaken, with the approbation of the Solicitor of the Treasury, for the purpose of securing certain payments due to the United States, and a further allowance for compensation in superintending the sale of certain real estate in Vermont. *Kellog's case*, 612.
9. The provision for the regulation of the fees and compensation of certain clerks, attorneys, counsellors, and marshals, in the district courts of the United States, contained in the act making appropriations for the civil and diplomatic expenses of the government for the year 1841, was designed to reduce the fees of the federal officers whose compensation by existing laws exceeds \$1,500 per year, to the scale of fees allowed by law for similar services in the highest State courts. *Hoffman's case*, 626.
10. To give effect to this provision the several officers embraced within it should ascertain, as far as practicable, whether all the fees, emoluments, and receipts of their office, as allowed under anterior laws, will make their entire compensation exceed the sum of \$1,500 per annum; and if it be reasonably certain that they will, the officer must be confined in his charges to the rates of fees prescribed by the proviso. If they will not, or if the question be fairly doubtful, the old rule may be adhered to. *Ibid.*

DISTRICT MARSHALS.

1. Marshals are liable to account to the United States for moneys paid to their

DISTRICT MARSHALS (*Continued.*)

- deputies on execution, even though the returned day of the execution may have passed; and defendants in such execution who shall have paid money on the same after the return day, are entitled to be credited at the treasury for such payments. *Col. Tennille's case*, 78.
2. The accounts of marshals certified by the court, or one of the judges thereof, as provided in the fourth section of the act of May 8, 1792, are conclusive upon the accounting officers of the treasury, except in cases where charges shall be allowed by the court or judge for a service or purpose not mentioned in the acts of Congress, and where a greater sum shall be allowed than that fixed by law. *Waddell's case*, 316.
 3. As to whether a charge of two dollars for serving a writ of subpoena is proper, it is not perceived that there is any legal warrant for excepting it from the enacting words of the statute giving that compensation for the service of any process, &c. *Ibid.*
 4. The account of the marshal of the District of Columbia, for extra allowances to government witnesses on the trial for the burning of the treasury buildings, made by the circuit court, and certified, cannot be legally paid, notwithstanding the certificate, for the reason that no act of Congress authorizes payment of charges for such a purpose. *Case of the Marshal of the District of Columbia*, 318.
 5. The distinction between this and the preceding case is, that here the service is not, whilst there it was, authorized by law. The two opinions read together clearly define the views of the Attorney General upon the subject of the efficacy and legal bearing of the certificate of the court upon the accounts of marshals. *Ibid.*
 6. It is inexpedient for accounting officers in any case, unless thereunto specially directed by act of Congress, to re-adjudicate upon the items of an account of a district marshal which have once been considered and settled. *McCalla's case*, 461.
 7. Where a marshal received, in due course of law, processes of summons and subpoena for the same witnesses, (it being the usual mode of procuring the attendance of witnesses in the court from which they issued,) and served the same as required, he is entitled to his fees for both services, on their being allowed and certified by the district judge. *Waddell's case*, 497.
 8. Marshals have no control over the practice of the courts, nor over the kind of process which they may issue; they are simply bound, as officers of the courts, to execute the process issued to them. *Ibid.*
 9. In a matter of general and established practice, the regular taxation of the costs, and their allowance in due form by district judges, are binding and conclusive upon the accounting officers. *Ibid.*
 10. Where it is the settled practice of the court to procure the attendance of witnesses by the service both of the process of summons and subpoena, and an order issues to the marshal to summon witnesses, that officer is entitled to an allowance of fifty cents for performing the order, and the stated compensation for serving the summons and subpoena. He cannot disregard the orders or process issued by the court, even though they are superfluous; but must execute such as shall be issued to him in the ordinary practice, and for which he is entitled to the prescribed fees at the hands of the government. *Waddell's case*, 536.
 11. The taxation of the court, and the allowance and certificate of the judge, are conclusive upon the accounting officers when the service or purpose is enumerated in the act of Congress, and the sum allowed thereof is not exceeded. *Ibid.*
 12. The marshal cannot be allowed more for the service of a summons, where a subpoena and summons shall have been issued to him to obtain the attendance of a single witness, than the sum prescribed for summoning a single witness. *Ibid.*
 13. The provision for the regulation of the fees and compensation of marshals, in the district courts of the United States, contained in the act making appropriations for the civil and diplomatic expenses of the government for the

DISTRICT MARSHALS (*Continued.*)

year 1841, was designed to reduce the fees of those whose compensation by existing laws exceeds \$1,500 per year, to the scale of fees allowed by law for similar services in the highest State courts. *Advice*, 627.

14. The district marshal of the United States should obey an injunction issued against him by the surperior court of a Territory. *Advice*, 643.

DRAFTS.

1. If a third person receive a treasury draft, in due course of business, for a valuable consideration, with proper endorsements, and without suspicion that the payee, or any bearer thereof, parted with it unlawfully or improperly, he has a claim upon the government for its amount. *Advice*, 30.
2. But if such third person have any notice that the draft was issued for public purposes, and intrusted to an individual to present at the bank and receive the money thereon for the army, and had lost it by gambling, or some similar misconduct, such notice defeats his claim upon the government. *Advice*, 30.
3. Deposit banks from which a transfer is ordered, are liable for interest until the moneys transferred shall be actually placed to the credit of the Treasurer in those to which the transfers shall be made. *Advice*, 141.
4. Transfers of money to the mint, by order of the President, for the purpose of coinage, in execution of the proviso to the twelfth section of the act to regulate the depositees of public money, should be made by drafts in the same manner as from one deposite bank to another, remaining to the debit of the Treasurer as money in the treasury. *Advice*, 144.
5. Where the Treasurer of the United States issued a draft upon a deposite bank to a navy agent, who sold it in order to raise money for necessary expenditures, and the draft was afterwards presented, and dishonored—*HILL*, that it was proper for the Treasury Department to pay the interest and costs incident to the dishonor, and the amount, from the original appropriation under which it was drawn. *Case of the Bank of the United States*, 320.
6. And as the holders are public creditors, the amount may also be paid in treasury notes under the 4th section of the act of 12th October, 1837. *Ibid.*
7. Where an assistant quartermaster gave a draft on another assistant quartermaster to A, who sold it to B, who surrendered it for an authority to draw on the maker for the amount, and afterwards drawing therefor by making a bill and selling it to C, who caused it to be presented to the drawer of the first draft, who had been served with papers at the suit of A, as garnishee—*DECIDED*, that the drawee should disregard A's process, and that he pay the draft which he had authorized to be drawn upon him. *Baldwin's case*, 605.
8. Where a receiver of public moneys at Kalamazoo received in payment for public lands the notes of a specie paying bank that afterwards suspended specie-payments, and then took from the bank a draft on another bank which was returned dishonored; and a receiver of assets having been appointed under the laws of Michigan, with whom the receiver of public moneys filed a claim for this debt—*HILL*, that, notwithstanding the acts of the latter, the legal priority of the United States to payment still exists. *Sheldon's case*, 625.

ENDORSEMENTS.

1. If a third person receive a treasury draft, in due course of business, for a valuable consideration, with proper endorsements, and without suspicion that the payee, or any bearer thereof, parted with it unlawfully or improperly, he has a claim upon the government for its amount. *Advice*, 30.

EVIDENCE.

1. The Department of War is at liberty to receive, and ought to receive, any credible evidence, documentary or oral, coming from any disinterested source, which may tend to establish the fact that heads of families signified to the agent, within due time, their intention to remain and become citizens of the States. *Advice*, 134.

EVIDENCE (*Continued.*)

2. Further evidence in support of the fairness and regularity of claims to land made pursuant to the first and second sections of the act of 2d July, 1836, may be received by the Commissioner of the General Land Office. *Advice* 149.
3. The Treasury Department has no authority to require a certificate that notice has been given, or that lands are liable to entry; nor can the Treasurer refuse pay for a specific tract, unless he have official evidence that it is not subject to sale. *Advice* 274.
4. The Executive will not set aside the proceedings of courts-martial merely because they have admitted the testimony of negroes or made other mistakes, though objected to, where it appears, upon the whole case, that justice has been done and that the verdict is substantially right. *Advice*, 523.
5. It is error in proceedings before courts-martial to receive evidence after the court has been cleared for deliberation. *Advice*, 545.
6. In the case under consideration, where the jurisdiction of the court was called into question on account of the early date of the enlistment, the record ought to have contained authentic evidence of the terms and period of the enlistment, that the revising officer might judge whether or not the court had jurisdiction. *Ibid.*
7. It is not sufficient to return the inferences or conclusions of courts-martial, nor mere statements of the evidence, or books or papers inspected; but the evidence itself on which they based judgment must be returned. *Ibid.*
8. There is no doubt of the competency of the evidence of the prosecutor before a court-martial; but how far his credibility may be affected by the relation in which he stands towards the accused, is a question of discretion for the court itself. *Lindsay's case*, 714.

EXECUTIVE.

1. The consent of the President is requisite to the location of grants made by any one of the three Pottawatomie treaties, within the limits of the others. *Advice*, 33.
2. The consent of the President is requisite to the sale of the Choctaw reserves under the treaty of 27th September, 1830. *Advice*, 48.
3. Acts of Congress containing no provision as to the time when they shall take effect, go into effect upon their receiving the approbation of the President. *Advice*, 82.
4. The act of the 14th of July, 1836, places the General Land Office under the supervision of the Secretary of the Treasury. If there be doubts of its effect, it is at any rate competent for the President to exercise his control by directing the Secretary of the Treasury to superintend the same, under the usual subordination to him. *Advice*, 137.
5. The salaries of judicial and other officers appointed for the Territory of Michigan are to be paid until the State shall have been actually admitted into the Union by the proclamation of the President. *Advice*, 170.
6. The President's authority to nominate to office cannot be exercised nor interfered with by the Senate. The constitutional action of that body in relation to appointments is limited to a simple affirmation or rejection of his nominations; and, unless there be a concurrence in nominations as made, they fail, and commissions cannot properly issue. *Coxe's case*, 189.
7. The Senate may suggest conditions and limitations to the President, but cannot vary those submitted by him; for no appointment can be made, except on his nomination, agreed to without qualification or alteration. *Ibid.*
8. A general approval endorsed on an Indian's petition for authority to alienate his reserve, under the treaty with the Ottawas, &c., of the 29th August, 1821, is a valid consent—such having in 1822 been the mode adopted by the President for the exercise of his supervision. *Thorn's case*, 309.
9. Under the order of the Treasury Department, approved by the President on the 5th of October, 1833, disbursing officers may legally keep the public moneys intrusted to them on deposit in the banks heretofore selected by the treasury, and which now have the public money. *Advice*, 233.

EXECUTIVE (Continued.)

10. Disbursing officers may legally make special deposits of their funds in non-specie-paying banks, if so directed by the President, where they will agree to receive the funds in that way. *Ibid.*
11. The moneys received from the sale of reservations located for Creek orphans, under the treaty with the Creeks of March 24, 1832, were properly brought into the treasury, and may be drawn out for investment or payment whenever the President shall direct. *Advice*, 238.
12. It is the duty of the Executive of the United States, to whom the care of our foreign relations is committed, to take all lawful measures for the protection of alien subjects of a state with whom the United States are at peace, who shall have placed themselves under the safeguard of our laws. *Advice*, 253.
13. The President has power to expel intruders from the lands secured to the Chickasaws east of the Mississippi by military force, if necessary. *Advice*, 255.
14. It is the duty of the Executive to secure to all persons a fair and equal opportunity of purchasing the public lands. *Advice*, 274.
15. The President has the power to reserve from public sale any or all of certain mineral lands in Wisconsin, and may, if he deem it advisable, lease them. *Advice*, 277.
16. Where, from want of proper and necessary information, he shall have failed to make the necessary reservation prior to the public sale, it is competent for him then to direct the reservation. *Ibid.*
17. The arrangements for this expedition being at the discretion of the President, he may appoint and employ a medical assistance thereto, without the formality of an examination and approval by the board of surgeons. *Advice*, 289.
18. The President and Senate, by nomination and confirmation, may correct the date of military appointments even after as great a lapse of time as that which has occurred in the case of Captain Twiggs. *Advice*, 307.
19. The President may withhold patents in cases where he shall be satisfied that certificates have been obtained fraudulently. *Advice*, 343.
20. If the President shall be of opinion that the secretary of the commander of the surveying and exploring expedition rendered services before he received formal notice of his appointment, and have an equitable claim to payment, he may be paid out of the appropriation of 1836, without sending the claim to Congress. *Reynold's case*, 357.
21. The President has no power to cause fugitive slaves, who have taken refuge among the Indians west of the Mississippi, to be apprehended and delivered by the United States officers and agents to the owners from whom such slaves shall have fled. *Advice*, 370.
22. Even where slaves shall have taken refuge in the States, the President has no authority to cause a surrender except when previously directed or empowered by a law. *Ibid.*
23. Congress has been silent hitherto upon the subject of fugitives among Indians; and although it have the power to make regulations not inconsistent with subsisting treaty stipulations, until it shall have enacted a law in that respect the President has no authority to interpose. *Ibid.*
24. There is no constitutional right vested in the Executive to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, nor legally adjudged to belong to another. *Capt. Clarke's case*, 377.
25. On completion of payment for Creek reserves conveyed by the reservees to other persons, certified by some person appointed by the President for that purpose, and approved by the President himself, patents must issue to the purchasers. *Advice*, 413.
26. The power of the Executive to grant reprieves and pardons extends to the remission of fines, penalties, and forfeitures, and costs in criminal cases, and may be exercised in degrees at different times at the discretion of the incumbent of the office. *Advice*, 418.

EXECUTIVE (*Continued.*)

27. A portion of a sentence may be remitted at one time, and another portion of it at another time, and by another Executive. *Ibid.*
28. And the same power is possessed by the Executive over a judgment after security for its payment shall have been given, as before. *Ibid.*
29. The President does not possess the power to order any portion of a specific appropriation for the mileage and pay of members of the House of Representatives to be transferred to the contingent fund of that body. *Advice*, 442.
30. The treaty with the Winnebagoes provided that certain payments therein stipulated to be made should be made by the President of the United States, and with which the judiciary cannot rightfully interfere; and the agents appointed by the President may proceed to make the payments, in disregard of any writs of injunction which the judiciary may allow. *Advice*, 471.
31. The judiciary cannot arrest the execution of a treaty by stopping the money designed to be paid under it, in the hands of the agents of the Executive. *Ibid.*
32. The President will be justified in ordering the marshal having the schooner *Amistad* in custody, to deliver the vessel and cargo to such persons as may be designated by the Spanish minister to receive them. *Advice*, 484.
33. The President cannot lawfully express any opinion respecting the claim of William Otis until the accounting officers shall have passed upon and settled all the items of the account. For him to do so, would be inconsistent with the act of Congress, and at variance with the established system of auditing and settling accounts at the treasury. *Advice*, 500.
34. The Executive will not set aside the proceedings of courts-martial merely because they have admitted the testimony of negroes or made other mistakes, though objected to, where it appears, upon the whole case, that justice has been done and that the verdict is substantially right. *Advice*, 523.
35. The President may authorize the marshal to remove all persons who have fixed their residences on the public reservations, without authority, beyond the lines of the posts of Tampa Bay, for the purpose of selling liquor to the troops, and the suspected purpose of supplying the Indians with ammunition. *Advice*, 566.
36. The approval by the President of the location of certain lots by reservees under the Winnebago treaty of 1st August, 1829, vests a title in the reservees that is superior to that of certain Polish exiles who located 18th April, 1836, under act of 30th June, 1834. *Advice*, 584.
37. The Chickasaw invested stocks belonging to the fund created by the treaty of 20th October, 1832, cannot be transferred to the Choctaws in payment of the land purchased of them, without the previous consent of the President and Senate. *Advice*, 591.
38. The general assent of the President and Senate to the stipulations of the convention between the Chickasaws and Choctaws, by which the former were to pay the latter five hundred and thirty thousand dollars, cannot be regarded as such an assent as to authorize an application of the funds of the Chickasaws to the payment suggested. *Ibid.*
39. The President of the United States may properly confirm sales of Creek reservations made by administrators pursuant to the orders of courts having jurisdiction, whether the distribution of the proceeds among the heirs shall have been correctly made or not; provided the purchasers shall have paid in the purchase money in good faith to the administrators or legal representatives. *Advice*, 596.
40. The pardoning power vested in the President extends to fines imposed upon individuals for conduct adjudged to be contempts of the circuit courts. *Advice*, 622.
41. It is a sufficient compliance with the provisions of the act of July 4, 1836, for the engrossing clerks to write the name of the President to patents, and for the secretary thereafter to attest them by his signature. *Advice*, 623.
42. According to the practice of the executive department, the President is not

EXECUTIVE (*Continued.*)

- considered as authorized, in the absence of any express provision by treaty, to order the delivering up of fugitives from justice. *Advice*, 661.
43. The constitution authorizes the President to fill vacancies that may happen during the recess of the Senate, even though the vacancy shall occur after a session of the Senate shall have intervened. *Advice*, 673.
 44. The President had a discretionary authority to proclaim lands in the territory of Orleans for sale immediately on being informed that the surveys were made and proper land officers appointed to conduct them. *Advice*, 697.
 45. The Executive should not consent to place the government of the United States, which is not liable, without its special consent, to be questioned in its own courts, to be made compulsorily accountable, as stakeholder or garnishee, to its debtors, their assignees, or creditors—at least without a judicial decision to that effect by the highest tribunal known to the laws. *Advice*, 718.

EXTRADITION.

1. The Executive has no authority to cause fugitive slaves, who have taken refuge among the Indians west of the Mississippi, to be apprehended and delivered to the owners from whom they fled. *Advice*, 370.
2. Even where slaves shall have taken refuge in the States, the President has no authority to cause a surrender except when previously directed or empowered by a law. *Ibid.*
3. Congress has been silent hitherto upon the subject of fugitives among Indians; and although it have the power to make regulations not inconsistent with subsisting treaty stipulations, until it shall have enacted a law in that respect, the President has no authority to interpose. *Ibid.*
4. It is proper for the Executive to cause the negroes taken on board the Spanish schooner *Amistad* to be surrendered to such persons as may be designated by the Spanish minister. *Advice*, 481.
5. The case of the *Amistad* negroes is adjudged to be within the 9th article of the treaty of 27th October, 1795, between the United States and Spain. *Ibid.*

FEES.

See **COMPENSATION.**

FORFEITURE.

1. Forfeitures incurred under laws of the United States may be remitted by the Executive, whose power to pardon extends as well to them as to sentences of court. *Advice*, 418.
2. The Postmaster General ought not to meddle with any case of forfeiture finally disposed of on deliberate examination by his predecessors. *Advice*, 684.

FOREIGNERS.

1. Unnaturalized foreigners are authorized to claim pre-emption of lands in cases where the local laws allow them to hold and convey real estate. *Advice*, 90.
2. It is the duty of the Executive of the United States, to whom the care of our foreign relations is committed, to take all lawful measures for the protection of alien subjects of a State with whom the United States are at peace, who shall have placed themselves under the safeguard of our laws. *Advice*, 253.
3. But where aliens shall have suffered violence from citizens of the United States, they can be protected only by the redress to be afforded in the courts, and the special interposition of the legislature. *Ibid.*
4. Unnaturalized foreigners cannot lawfully be enlisted into the military service of the United States; and until the passage of an act legalizing the same, all such enlistments already made must be regarded as invalid. *Advice*, 671.

FRANKING.

1. Postmasters cannot lawfully receive to be conveyed in the mail any packet weighing more than three pounds in any case whatever, except such as are

FRANKING (*Continued.*)

specially provided for in the act of the 19th December, 1821, and the joint resolution of the 13th of January, 1831. *Advice*, 164.

2. The taking a seat in a special session of the Senate called and held for Executive business, merely, and without any contemporaneous meeting of the House of Representatives, is not such a taking of a seat in Congress as will entitle a Senator to the exercise of the franking privilege. *Advice*, 171.

FRAUD.

1. Frauds in contracts or accounts for the transportation of the United States mail may be inquired into as well by successors as by the Postmaster General who made such contracts or settled such accounts. *Advice*, 1.
2. Virginia land scrip is so far representative of money as to be subject to the same equitable deductions, in cases of indebtedness to or frauds committed upon the government, as may be made in the case of a sum of money from the government to one of its debtors. *Advice*, 35.
3. On the discovery of fraud in the obtaining of certificates for land, the Commissioner of the General Land Office may suspend the issuance of patents. *Advice*, 93.
4. Sales by the Creeks, where purchasers, either by force or fraud, abstract from them the purchase money, are fraudulent and void. *Advice*, 259.
5. So, also, are sales approved by the President where the reservee was personated by other Indians; and patents may be withheld. *Ibid.*
6. The register and receiver, under the power given to them in the 12th section of the act, may examine the claim of De Feriot, and the evidence on which it was founded, for the purpose of ascertaining whether it was founded on a real or fabricated grant, and also for the purpose of ascertaining whether or not the confirmation was fraudulently obtained; and, if satisfied that fraud has been practised, they ought not to make the survey nor issue the certificate. *De Feriot's case*, 343.
7. The President may withhold a patent in such case, even though a certificate shall have been issued. *Ibid.*
8. Where the American consul at Havana, to whom an American brig reported herself, suspected her papers to be fraudulent, and not such as to entitle her to the protection which belongs to vessels sailing under the American flag, and ordered the commander of a ship of war lying at that port to seize and detain her until the government could be advised of the facts and direct as to the course to be adopted; and a correspondence having ensued between said consul and the Captain General of Cuba, disposing of the question of the violation of the sovereignty of Spain, in making the seizure in the port of Havana; and the question under the several navigation acts, and the laws to prohibit the slave trade, being presented as to the legality of the seizure, and the course to be pursued under the circumstances—*DECIDED*, that, whenever there is just cause to believe that any merchant vessel is engaged in an illicit trade, a public vessel has the right to detain her until our government can act upon the subject; and that the question of the violation of the sovereignty of any foreign government in nowise affects the question in respect to the liability of the suspected vessel to seizure under such circumstances. *Advice*, 405.
9. Although the laws turn out to be improvident for the punishment of just this species of fraud, it was competent for the consul to give the order, and for the public vessel to make the seizure and detention—nevertheless, without further proof that the vessel was engaged or arranged to be engaged in the slave trade, further proceedings should not be taken in the premises. *Ibid.*

GARNISHEE.

1. Where an assistant quartermaster gave a draft on another assistant quartermaster to A, who sold it to B, who surrendered it for an authority to draw on the maker for the amount, and afterwards drawing therefor by making a bill and selling it to C, who caused it to be presented to the drawer of the first draft, who had been served with papers at the suit of A, as garnishee—

GARNISHEE (*Continued.*)

- DECIDED, that the drawee should disregard A's process, and that he pay the draft which he had authorized to be drawn upon him. *Baldwin's case*, 605.
2. The Executive should not consent to place the government of the United States, which is not liable, without its special consent, to be questioned in its own courts, to be made compulsorily accountable, as stakeholder or garnishee, to its debtors, their assignees, or creditors—at least without a judicial decision to that effect by the highest tribunal known to the laws. *Buchanan's case*, 718.

GUARDIANS.

1. Where a Choctaw reservee conveyed his reservation to D, in trust, to sell and apply the proceeds to the payment of a debt owing by the reservee to A and R, who thereupon sold a portion of the land, and with the proceeds paid a part of the said debt; and, at this stage of the affair, the reservee died, leaving two children, whose guardian, under the pretence that he was acting for the children, bought the residue at a sum far below its value, who, after taking H into partnership with him, conjointly with him sold the land to Banks and Lewis, without the consent of the President, and refused to pay over any part of the proceeds to said children—*DECIDED*, that the President ought not to give his approval to the sale to said Banks and Lewis, as it would probably deprive the children of their inheritance. *Case of Banks & Lewis*, 518.

INDIANS.

1. The three treaties of 1832 with the Pottawatomie Indians may be considered as forming one transaction; and, except where special provision is otherwise made, the lands agreed by any one of them to be granted by the United States to individuals may be located within the limits of the cessions made by any one of the three, provided the party entitled to the grant assents thereto, and the President so directs. *Advice*, 33.
2. A widow keeping house, and having children or other persons residing with her, is the head of a family, within the meaning of the fifth article of the treaty with the Chickasaws. If her children, or other persons residing with her, however, are provided for in the sixth or eighth articles, they cannot be included in the family enumeration. *Advice*, 34.
3. Widows keeping house without children or other persons residing with them, are, if they own slaves, entitled to the section, or half section, given by the fifth article, according to the number of their slaves. *Ibid*.
4. The reservees named in the supplement to the Choctaw treaty of September 27, 1830, may, with the approbation of the President, sell and convey their reserves. *Advice*, 48.
5. Patents must issue under the fourteenth and nineteenth articles of the Choctaw treaty of 1830, and the Chickasaw treaty of 1834, in order to divest the United States of title in the reservations. *Advice*, 49.
6. Patents for reserves, under the former, may issue to Indian residents or assignees; under the latter only to the reservees. *Ibid*.
7. Allen Yates and wife are each entitled to two sections of land under the second clause of the supplement to the treaty of Dancing Rabbit Creek. *Advice*, 106.
8. The lands ceded by the Quapaw treaty of August, 1818, are not subject to pre-emption under the act of April 12, 1814. *Advice*, 106.
9. The Indian title not having been extinguished, they could not have been settled prior to the date of that law, consistently with the claim of the Quapaws. *Ibid*.
10. In the event of the death of reservees, under the Choctaw treaty, before the expiration of the five years' residence upon the land, required as a condition precedent to a grant and fee-simple, the interest is not defeated, but goes to those persons who, by the State laws, succeed to the inheritable interest of individual Indians. *Advice*, 107.
11. The Indian reservees under a treaty have a right paramount and superior to any grant of sections to States. *Advice*, 205.

INDIANS (*Continued.*)

12. Until their title shall be fully extinguished, the grants of Congress cannot operate. *Ibid.*
13. The stipulation contained in the treaty of March, 1836, with the Ottawa and Chippewa Indians, for the right of hunting on the land ceded, and the other usual privileges of occupancy, until the land should be required for settlement, reserved its use for all the purposes of Indian occupancy as the same then existed. *Advice*, 206.
14. The sum of sixty thousand dollars constitutes the whole amount which can be paid by the United States for the claims of citizens for services rendered the Cherokee nation by the treaty of 1836. *Advice*, 207.
15. A general approval endorsed on an Indian's petition for authority to alienate his reserve, under the treaty with the Ottawas, &c., of the 29th August, 1821, is a valid consent—such having in 1822 been the mode adopted by the President for the exercise of his supervision. *Advice*, 209.
16. The reserves under the Creek treaty of 1814, and the act of 1817, have not power to lease their lands; the renting for a term of years and removal from the State may be regarded as an abandonment of their reservations. *Advice*, 230.
17. On their abandonment, the titles become immediately vested in the United States by operation of law, and is to be then treated as if then for the first time acquired by a treaty. *Ibid.*
18. The moneys received from the sale of reservations located for Creek orphans, under the treaty with the Creeks of March 24, 1832, were properly brought into the treasury, and may be drawn out for investment or payment whenever the President shall direct. *Advice*, 238.
19. Sales by the Creeks, where purchasers, either by force or fraud, abstract from them the purchase money, are fraudulent and void. *Advice*, 259.
20. So, also, are sales approved by the President where the reservee was personated by other Indians; and patents may be withheld. *Ibid.*
21. Patents may issue directly to a white person being the assignee of a Creek reservee, to whom the tribe had assigned a portion of the twenty-nine sections reserved under the 6th article of the Creek treaty of 1832. *Advice*, 288.
22. The first and second classes of Indian reservees provided for in the thirteenth article of the treaty of December, 1835, with the Cherokees, are entitled to compensation in money in lieu of their interests, notwithstanding the supplementary articles concluded after the refusal of the President to allow pre-emptions. *Advice*, 297.
23. In respect to the third class there is doubt; yet the Attorney General, on the whole, concludes that the reservees of that class are also entitled, individually, to compensation in money. *Ibid.*
24. The compensation to the first and second classes must be paid by the United States, not out of the supplementary fund; but that to the third class must be paid from the \$600,000 set apart in the supplementary articles. *Ibid.*
25. The balance of the fund of \$600,000, after defraying from it the expenses of removal, which is the first charge upon it, was that designated by the treaty for the satisfaction of the various claims provided for therein; if insufficient, to be ratably distributed, and the balance to be charged to the general fund of \$5,000,000. *Advice*, 304.
26. There is no occasion for dividing the \$600,000, as the several agreements concerning compensation and spoliation are to be considered as one treaty. *Ibid.*
27. Indians have not been conceded the natural capacity to hold absolute title to lands, except in cases specially provided for by treaty; wherefore, the title of the Brothertown Indians to the land secured to them by the treaties with the Menomonies is not a fee-simple, but only such a right of occupancy as was previously possessed by the Menomonies themselves. *Advice*, 322.
28. Under the treaties of 1817 and 1819, with the Cherokees, the reservees therein could not properly locate their lands outside the limits of the ces-

INDIANS (*Continued.*)

- sions, respectively; but, as some of the reservations of 1817 were located within the lands ceded in 1819, and were included in the unceded lands under the latter treaty, these cases are to stand on the same ground as other reservations under the treaty of 1817, and equally entitled, under the treaties of 1835 and 1836, to compensation with those who located within the cession of 1819. *Advice*, 326.
29. But no provision has been made for those whose reservations, under treaties of 1817 and 1819, were located within the cessions of 1835 and 1836; and, as such reservations are not within the 13th article of the treaty of 1835-'36, they were authorized, and are not to be paid for as improved lands; but the holders are only entitled to pay for their improvements. *Ibid.*
 30. Reservations claimed under former treaties, not being ceded by the first article of the last, are not within the words nor intentions of the 9th article of the last; hence the reservees who may be entitled to compensation under the 13th, cannot claim pay under the 9th article for improvements on the same reservations. *Ibid.*
 31. But those who were to receive grants for their reservations are entitled to pay for the soil and their improvements thereon. *Ibid.*
 32. The children of the reservees, under the 8th article of the treaty of 1817, were entitled to reservations in fee-simple. *Ibid.*
 33. The residence of heads of Choctaw families who in due time signified to the agent their intention to remain and become citizens of the United States, or a valid excuse for non-residence, entitles them to grants pursuant to the treaty; and such grants when made are paramount to pre-emption and all other claims. *Advice*, 365.
 34. The removal of the Creek reservees from their reserved lands, without the intention of returning and occupying them as their place of residence, is an abandonment, which gives the right of possession and occupancy to the United States. *Advice*, 389.
 35. The only requisites to a title to reservations under the treaty of Dancing Rabbit creek, indicated in the treaty, are, that the persons applying be Choctaws and heads of families, and shall signify their intention of becoming citizens of the States within six months from the ratification of the said treaty. *Advice*, 408.
 36. The Wyandot nation of Indians have the authority to treat with the United States respecting the reservation of twelve miles square at and about Upper Sandusky, in the State of Ohio, as the supplement to the treaty of 1817 reinvested them with their title in trust. *Advice*, 458.
 37. Whilst the claim of an attorney for the Cherokees cannot be paid out of funds due them under the 9th article of the treaty—if the department shall be satisfied that the contract between him and his principal is free from fraud, and his claim is for a just compensation for services rendered, the department ought to recognise him as having an interest in the fund, and pay him accordingly. *Advice*, 504.
 38. Payments may be made directly to the Indians, yet care should be taken that those who have rendered them service in collecting evidence, &c., be not defrauded. *Ibid.*
 39. Where a Choctaw reservee conveyed his reservation to D, in trust, to sell and apply the proceeds to the payment of a debt owing by the reservee to A, and R, who thereupon sold a portion of the land, and with the proceeds paid a part of the said debt; and, at this stage of the affair, the reservee died, leaving two children, whose guardian, under pretence that he was acting for the children, bought the residue at a sum far below its value, who after taking H into partnership with him, conjointly with him sold the land to Banks and Lewis, without the consent of the President, and refused to pay over any part of the proceeds to said children—DECIDED, that the President ought not to give his approval to the sale to said Banks and Lewis, as it would probably deprive the children of their inheritance. *Advice*, 518.

INDIANS (*Continued.*)

40. Where Creek reserves died within the five years during which their reserves were to be withhold from sale, and the lawful administrators sold the reserves, and paid over the proceeds (less the expenses) to the Indian widows, as the heirs, and the question of other heirs being now raised, in opposition to the confirmation of the sales to the purchasers, who have paid the consideration money therefor once in full—DECIDED, that the purchasers are entitled to the confirmations which they ask, and should not be required to pay a second time any portion of the purchase money. *Advice*, 578.
41. Heads of Creek families who otherwise would be entitled to a patent for land in Alabama, have not forfeited their right to the same by having become residents and citizens of Georgia, before the expiration of five years from the time when his reservation was selected. *Advice*, 585.
42. The Chickasaw invested stocks belonging to the fund created by the treaty of 20th October, 1832, cannot be transferred to the Choctaws in payment of the land purchased of them, without the previous consent of the President and Senate. *Advice*, 591.
43. The Seneca Indians are entitled to the possession of their hunting-grounds, as well as their cultivated lands, until the time limited by the treaty with them for their voluntary removal. *Advice*, 624.
44. The Indian right of occupancy of land in the territory of Orleans having been fairly extinguished by treaty, and the government having come to be in full and complete possession of the lands in question, it had become both expedient and necessary that they should be surveyed and put into market. *Advice*, 697.

INDULGENCIES.

1. The Solicitor of the Treasury may grant indulgences upon custom house bonds, in the form of instructions to district attorneys who have received them for prosecution, in such cases and on such terms as shall be deemed advantageous to the United States. *Advice*, 247.
2. And, although the Solicitor has no jurisdiction of bonds until they are placed in the hands of district attorneys, he may, in proper cases, give the instructions conditionally in advance, as to the course to be pursued. *Ibid*.

INJUNCTIONS.

1. Neither the Executive nor the agents appointed by him to execute a treaty with the Indians, can be lawfully enjoined by the judiciary. *Advice*, 471.
2. Injunctions issued out of superior courts of a territory should be obeyed by district marshals. *Advice*, 643.
3. The circuit courts of the United States have not power to enjoin the Auditor of the Post Office Department from paying a contractor for carrying the mails, nor to enjoin the contractor from making collections from postmasters, according to his contract with the government. *Advice*, 667.

INTEREST.

1. The deposit banks are required to pay interest upon any sum which may remain in them to the credit of the Treasurer of the United States over and above three-fourths of their capital, respectively, for the period which may elapse before the Secretary of the Treasury shall find it expedient to transfer it to another bank—whether the same have been used or remained un-employed. *Advice*, 141.
2. Deposit banks from which a transfer is ordered, are liable for interest until the moneys transferred shall be actually placed to the credit of the Treasurer in those to which the transfers shall be made. *Ibid*.
3. Money held by the agencies of deposit banks must be regarded, in respect to liability for interest, as well as in all other respects, precisely as if no agencies existed, and as if the money were held at its ordinary place of business, and in the ordinary way. Interest should be charged upon the amount which may be held by both the bank and its agencies above one-fourth of the capital stock. *Ibid*.
4. Banks employed as depositories before the passage of the act of 1836, which

INTEREST (*Continued.*)

- have had an amount exceeding one-fourth of their capital during the whole of the fiscal quarter elapsed since the act, are chargeable with interest for the quarter, although their agreements were not executed until a part of the term had expired. *Advice*, 156.
5. But in order to make them liable for the interest, the deposits must have exceeded one quarter of the capital for the whole quarter. *Ibid.*
 6. Interest on a demand against the United States is properly allowable where the claimant, in a suit against him, obtained a judicial decision in his favor, and the act of Congress providing for its payment proceeded upon the knowledge that interest had been allowed by the court. *Thomas's case*, 294.
 7. Interest on treasury notes issued under the act of the 12th October, 1836, and placed in the hands of disbursing officers to meet public liabilities, does not begin to accrue until they are actually issued by such officers. *Advice*, 296.
 8. Where the Treasurer of the United States issued a draft upon a deposit bank to a navy agent, who sold it in order to raise money for necessary expenditures, and the draft was afterwards presented, and dishonored—*HELD*, that it was proper for the Treasury Department to pay the interests and costs incident to the dishonor, and the amount from the original appropriation under which it was drawn. *Advice*, 320.
 9. Interest cannot be legally claimed upon the stocks issued by the State of Maryland, and redeemable at the pleasure of the State, which are held in trust for the Chickasaws, from the time when the funds were provided by the State for the redemption of the principal. *Advice*, 495.
 10. A legislative provision ought to be regarded as notice, by a State to the holders of its stock, sufficient to bar any legal claim to subsequent interest. *Ibid.*
 11. Interest on claims for losses occasioned by troops in the service of the United States is not allowable, unless the same shall be expressly provided for in the act of Congress under which the claim is authorized to be paid. *Wood's case*, 635.

INTRUDERS.

See PUBLIC LANDS.

INVENTIONS.

See PATENTS.

JUDICIARY.

1. The orphans' court of the county of Washington has power to grant letters of administration in respect to assets existing in the county, and payments made by the Treasury Department, to an administrator thus appointed, are regular; yet, in a case where the decedent resided in Baltimore, and left a will appointing an executor there, and letters granting administration *de bonis non* are afterwards granted in Maryland upon the same estate, the letters issued in Washington become subordinate to them. *Case of the Executor of Thompson*, 89.
2. But where the department sees that the just claims of other persons will be liable to be defeated by delivery of land scrip, it may lawfully suspend the actual delivery until claimants can have time to apply to a court of equity for an injunction; and, if it be procured, to retain the scrip until the rights of the parties can be judicially determined. *Advice*, 98.
3. In construing public grants issued in great numbers by the officers of the government, and in accordance with a certain formulary deliberately adopted by those officers, the courts may resort to contemporaneous documents on file in the proper department for the purpose of ascertaining the intent of the grantors. *Advice*, 111.
4. The salaries of judicial and other officers appointed for the Territory of Michigan are to be paid until the State shall have been actually admitted into the Union by the proclamation of the President. *Advice*, 179.
5. The State courts only have jurisdiction of criminal offences committed upon the persons of alien residents of the United States. *Advice*, 254.

JUDICIARY (*Continued.*)

6. The circuit courts of the United States have jurisdiction of civil actions in such cases where the offenders are citizens. *Ibid.*
7. Where the judiciary have given a construction to a contract between an individual and the government, the decision should be observed and recognised by the officers of the treasury in the adjustment of claims predicated therein. *Thomas's case*, 294.
8. The judiciary must first settle the question of the legality of the blockade and capture in the case of the *Lone*, commanded by Captain Clarke, before the Executive department can properly act upon the claim of the French government respecting the rescue. *Capt. Clarke's case*, 377.
9. Territorial judges, not being constitutional but legislative officers only, and not civil officers within the meaning of the constitution, are not subject to impeachment and trial before the Senate of the United States. *Advice*, 409.
10. The judiciary only have power to declare an act of Congress to be in violation of treaty stipulations, and therefore void. *Advice*, 427.
11. It is wholly inadmissible under our government to place the military above the civil authority; and, therefore, whilst the latter shall have the custody of an officer of the navy for the purpose of trying and punishing him for a homicide, he cannot legally be made amenable to a court-martial. *Advice*, 466.
12. The judiciary cannot arrest the execution of a treaty by stopping the money designed to be paid under it, in the hands of the agents of the Executive. *Advice*, 471.
13. The judicial authority vested in the judge of the supreme court of St. Augustine, in relation to certain claims for injuries and losses specified in the act of Congress, is neither exclusive nor conclusive in the premises; but the Secretary of the Treasury may also examine into all the facts and circumstances of each case, and determine for himself whether the decision of the judge is just. *Wood's case*, 635.
14. The superior courts of Territories may issue injunctions in proper cases to restrain district marshals from executing orders of the Executive department, respecting the public lands. *Advice*, 643.
15. The judge of the superior court of St. Augustine is authorized to examine certain claims preferred under the treaty of 1819, with Spain, and certain acts of Congress passed to carry the same into effect; but in these cases his examination is only to enlighten the mind of the Secretary of the Treasury, as the verdict of a jury in a feigned issue is to enlighten the conscience of the chancellor; and his decision is simply *arbitrium boni viri*, and not conclusive, in any degree, upon the Secretary. *Advice*, 677.

JUDGES ADVOCATE.

1. Judges advocate of courts-martial are required to be sworn; and where the proceedings of such courts do not show that they were, it may be properly considered that the fact does not exist, and that they were not sworn, and that, therefore, the proceedings were irregular and void. *Clark's case*, 397.
2. It is a fatal error in proceedings before courts-martial for the president to omit to administer an oath or affirmation to the judge advocate before proceeding to trial. *Guthrie's case*, 544.

JUDGMENTS.

1. Judgments recovered against public officers, for acts done in the performance of official duty, should be paid by the department from funds applicable to such objects. *Com. Elliott's case*, 306.
2. Judgments recovered against public officers in favor of the United States, are not conclusive upon claims of such officers against the government, which were not set off in the action. *Ingersoll's case*, 345.
3. Where judgments shall be obtained against collectors for overcharges of duties, the government ought to discharge them and relieve them the consequence thereof. *Advice*, 393.
4. Judgments for penalties and forfeitures are as much within the scope of the pardoning power after security has been given for their payment as before. *Martin's case*, 418.

LANDS, PUBLIC.

1. The third section of the act of the 19th of February, 1831, does not confer the right of purchase and consequent title to the widow and children of A. Follin, deceased, to the exclusion of his assignee, claiming under the provision of the second section of the act of February, 1831, and 19th of February, 1833 *Advice*, 28.
2. The three treaties of 1832 with the Pottawatomie Indians may be considered as forming one transaction; and, except where special provision is otherwise made, the lands agreed by any one of them to be granted by the United States to individuals may be located within the limits of the cessions made by any one of the three, provided the party entitled to the grant assents thereto, and the President so directs. *Advice*, 33.
3. A widow of a Chickasaw Indian, keeping house and having children or other persons residing with her, is the head of a family within the meaning of the fifth article of the treaty with that nation. If her children or other persons residing with her, however, are provided for in the sixth or eighth articles, they cannot be included in the family enumeration. *Advice*, 34.
4. Widows of Chickasaws keeping house without children or other persons residing with them are, if they own slaves, entitled to the section or half section given by the fifth article according to the number of their slaves. *Ibid.*
5. Purchasers of lands reserved by the second and third articles of the Creek treaty of March 24, 1832, must have patents to complete their title. *Advice*, 40.
6. As many surviving Indian wives as were heads of families at the making of the Chickasaw treaty of 1834, (though wives of the same Indian,) are entitled to the reservations made in the fifth article thereof. *Advice*, 41.
7. The reserves named in the supplement to the Choctaw treaty of September 27, 1830, may, with the approbation of the President, sell and convey their reserves. *Advice*, 48.
8. Patents must issue under the fourteenth and nineteenth articles of the Choctaw treaty of 1830, and the Chickasaw treaty of 1834, in order to divest the United States of title in the reservations. *Advice*, 49.
9. Patents for reserves, under the former, may issue to Indian residents or assignees; under the latter only to the reserves. *Ibid.*
10. Patents are requisite to divest the United States of title to the Ottawa, Chipewewa, and Pottawatomie reserves, and should be so issued as to disclose the estate granted. *Advice*, 55.
11. The reservations under the Choctaw treaty of 1830 may be located on the sections granted in the act of March 2, 1819, to Alabama for the use of schools, notwithstanding said act, for the reason that the United States could only grant subject to the Indian right of occupancy. The contingency was provided for in the authority given for the granting of equivalent contiguous lands where section sixteen was disposed of. *Advice*, 56.
12. Pre-emption accrues to aliens under the acts of 1830 and 1834, especially where the local law authorizes them to hold and convey real estate. *Advice*, 90.
13. The assignee of a pre-emption certificate takes it subject to the equities subsisting between the settler and the United States. *Advice*, 91.
14. The legal title is in the United States until a patent issues; and where the equities are equal, the legal title will prevail. *Ibid.*
15. Decisions of registers and receivers upon the facts offered to establish pre-emption rights, under the act of 29th May, 1830, are conclusive. *Advice*, 93.
16. They act in a judicial capacity in weighing and deciding upon the sufficiency of the evidence offered; and although they are to observe the rules prescribed by the Commissioner of the Land Office, they cannot be compelled to act upon any judgment but their own. *Ibid.*
17. The issuing of patents, however, depends on the Commissioner, who may suspend them where the decisions were obtained by fraud, or founded in material errors of fact or law. *Ibid.*

LANDS, PUBLIC (*Continued.*)

18. Land scrip issued pursuant to the act of the 30th of May, 1830, for the relief of certain officers and soldiers of the Virginia line and navy, must be made out in the names of the persons *prima facie* entitled to it. *Advice*, 98.
19. If there be equitable assignees of the whole or any part of the scrip which may be issued, and they shall claim the same in hostility to the parties originally entitled, the scrip, if delivered at all, ought to be delivered to the parties originally entitled, their heirs, devisees, or other agent or agents, as contradistinguished from persons claiming interests, as assignees or otherwise, by contract. *Ibid.*
20. But where the department sees that the just claims of other persons will be liable to be defeated by such delivery of the scrip, it may lawfully suspend the actual delivery until claimants can have time to apply to a court of equity for an injunction; and, if it be procured, to retain the scrip until the rights of the parties can be judicially determined. *Ibid.*
21. In cases of doubt, patents may be suspended until the question shall have been determined by a competent tribunal. *Advice*, 102.
22. There is reason to doubt whether a pre-emption to an accumulation of land in the Mississippi can be allowed to exist. *Ibid.*
23. The Treasury Department may suspend the issuing of all or any portion of the scrip claimed on a warrant issued for a greater number of acres than may appear to be due, until the true amount can be ascertained. *Advice*, 103.
24. Under the act of the 19th February, 1833, registers of land districts are made judges of the validity of purchases made under the first section thereof; and the Treasury Department has no power to revise or reverse their decisions. *Advice*, 104.
25. Allen Yates and wife are each entitled to two sections of land under the second clause of the supplement to the treaty of Dancing Rabbit creek. *Advice*, 106.
26. The lands ceded by the Quapaw treaty of August, 1818, are not subject to pre-emption under the act of April 12, 1814. *Advice*, 106.
27. The Indian title not having been extinguished, they could not have been settled prior to the date of that law, consistently with the claim of the Quapaws. *Ibid.*
28. In the event of the death of reservees, under the Choctaw treaty, before the expiration of the five years' residence upon the land, required as a condition precedent to a grant and fee simple, the interest is not defeated, but goes to those persons who, by the State laws, succeed to the inheritable interest of individual Indians. *Advice*, 107.
29. The terms employed in the patent to Raphael Lesieur are not so vague as to render the patent void for uncertainty. In construing public grants issued in great numbers by the officers of the government, and in accordance with a certain formulary deliberately adopted by those officers, the courts may resort to contemporaneous documents on file in the proper department, for the purpose of ascertaining the intent of the grantors. *Advice*, 111.
30. The grant of the reservation is the essence of certain provisions of a treaty, and the direction as to the manner in which the same shall be located ought not to be so construed as to defeat the grant. *Wall's case*, 113.
31. Locations of sections, or parts of sections, should be made by taking whole, half, or quarter sections, as the case may be, without breaking up the legal divisions or disturbing sectional lines. *Wall's case*, 114.
32. In this case, the reservee is entitled to the half section on which his improvement is located, and the whole of that chosen for the balance. *Ibid.*
33. Legal evidence from competent sources, (excluding the oaths of claimants and all interested parties,) is what is intended by the word "proof" contained in the act of the 29th May, 1830. *Advice*, 126.
34. The Commissioner may prescribe the mode and kind of proof—how and by whom it should be taken; but cannot prescribe anything as proof which is not such in fact, nor any rule as to its weight and force. *Ibid.*

LANDS, PUBLIC (*Continued.*)

35. Where it is intended to admit the oath of an interested party, it is generally provided for in express terms. *Ibid.*
36. Unsupported affidavits of settlers are not admissible as proof under the act. *Ibid.*
37. Competent proof is required; yet the Commissioner cannot properly require competent proof to be corroborated. *Ibid.*
38. An entry allowed by the register and receiver upon the affidavit of the interested party and only corroborated by facts within their knowledge, is only erroneous and voidable, not void as against the United States. *Ibid.*
39. *Settlers or occupants*, within the meaning of the law, are those who reside personally on the public land in question, or who occupy and use it. Settlements and occupancy cannot be effected by proxy. *Ibid.*
40. Pre-emption floats mislaid on lands subject to another right of preference, may be raised and properly relocated at any time prior to the public sale of the lands, including the tract on which the original right accrued, but not afterward. *Advice*, 133.
41. The act of the 4th of July, 1836, places the General Land Office under the supervision of the Secretary of the Treasury. If there be doubts of its effect, it is at any rate competent for the President to exercise his control by directing the Secretary of the Treasury to superintend the same, under the usual subordination to the President. *Advice*, 137.
42. Certain lands having been actually entered under the pre-emption laws, pursuant to instructions sent to the register and receiver from the Treasury Department, the case is clearly brought within the terms of the second section of the act of July 2, 1836; and the patent should issue accordingly. *Carpenter's case*, 139.
43. The recorder of the General Land Office only has power to attest and seal patents for public lands, the former law in this respect having been repealed by the act of July 4, 1836. *Advice*, 140.
44. Fractional quarter sections selected under the special acts of 2d March, 1831, and 4th July, 1832, must each be taken instead of an entire quarter section. *Advice*, 148.
45. Additional selections to make the complement in quantity of ten sections, need a confirmatory act of Congress. *Ibid.*
46. The first section of the act of 2d July, 1836, confirms sales that are fair and regular in all respects, other than those provided for in the second section; and the same rule applies to the second section. *Advice*, 149.
47. The Commissioner has to judge of the proof, and may receive further evidence in support of the fairness and regularity of the claim. *Ibid.*
48. Where the purchase money is paid directly to the Treasurer, the specific tract of land must be stated, the same as if applied for at the office of the land district, and the same form must be pursued. *Advice*, 150.
49. All patents emanating from the General Land Office, whether of land sold, or of lands in respect to which private claims are recognised by acts of Congress, must be certified or countersigned by the recorder. *Advice*, 167.
50. By the terms "settlers" and "occupants" used in the pre-emption acts, is meant those who personally cultivate and reside on, or who personally cultivate, use, and manage the public lands. *Adams & Lapsley's case*, 182.
51. Actual residence on the land is not indispensable, yet with cultivation it is the highest evidence of that personal connexion which is indispensable. *Ibid.*
52. The head of a family, whose dwelling is not on the land, but who improves and cultivates by the application of his personal labor or by that of his family, hired men, servants, or slaves under his direction, is entitled to the benefits of the law. *Ibid.*
53. The law of landlord and tenant is inapplicable to the subject of pre-emptions; yet, as it has been made the basis of instructions, the rule ought to be followed. The act of 2d July, 1836, confirms such entries. *Ibid.*
54. A pre-emptor cannot be undermined by a subsequent fraudulent purchaser. *Ibid.*

LANDS, PUBLIC (*Continued.*)

55. The act of the 14th of July, 1832, is an amendment of the act of 1830, which is revived by the act of June 19, 1834, and is to be considered a part thereof. *Advice*, 195.
56. The Indian reserves under a treaty have a right paramount and superior to any grant of sections to States. *Advice*, 205.
57. Until their title shall be fully extinguished, the grants of Congress cannot operate. *Ibid.*
58. The stipulation contained in the treaty of March, 1836, with the Ottawa and Chippewa Indians, for the right of hunting on the land ceded, and the other usual privileges of occupancy, until the land should be required for settlement, reserved its use for all the purposes of Indian occupancy as the same then existed. *Advice*, 206.
59. A general approval endorsed on an Indian's petition for authority to alienate his reserve, under the treaty with the Ottawas, &c., of the 29th August, 1821, is a valid consent—such having in 1822 been the mode adopted by the President for the exercise of his supervision. *Advice*, 209.
60. A failure to pay for a pre-emption before a public sale of the lands in which it is situated, forfeits the right, and, consequently, the right to select eighty acres elsewhere; it may be saved, however, by a tender of payment in due time. *Advice*, 211.
61. A tender for the original tract and for the tracts selected, with a condition that the first shall not be received without the latter, is a good tender, provided all the tracts are liable to be selected; otherwise, not. *Ibid.*
62. A pre-emptor may float a tract returned as a regular half-quarter section, and two pre-emptors may float tracts that do not in the aggregate exceed 160 acres. He may select subdivisions of fractions where the land district contains no regular half-quarters, but, in such cases, should be confined to those containing the least excess over eighty acres. *Ibid.*
63. Where the district contains regular half-quarters, the two floats cannot take fractions which, united, amount to over 160 acres. *Ibid.*
64. Designating a tract before the coming in of a plat, so as to enable the proper officer to locate, is sufficient. Error in description is not fatal, if the tract be identified. *Ibid.*
65. The reserves under the Creek treaty of 1814, and the act of 1817, have not power to lease their lands; the renting for a term of years and removal from the State may be regarded as an abandonment of their reservations. *Advice*, 230.
66. On their abandonment, the title becomes immediately vested in the United States by operation of law, and is to be then treated as if then for the first time acquired by a treaty. *Ibid.*
67. Where H and F applied at a land office to enter certain lands, but not being able to comply with the regulations of the department, procured them to be marked and reserved from sale to T, who, soon thereafter, applied to purchase and pay for them, and was refused; and, afterwards, H and F made payment and obtained a certificate of purchase—decided, that the land officers should have complied with T's offer; and that, as a patent has not yet issued, the matter is yet under control of the General Land Office. *Advice*, 240.
68. Scrip for revolutionary land warrants may be issued; and for that purpose the first section of the act of May 30, 1830, is now in force. *Advice*, 246.
69. The President has power to expel intruders from the lands secured to the Chickasaws east of the Mississippi by military force, if necessary. *Advice*, 355.
70. A person who inhabited one quarter section and cultivated another, of which he was in possession on the 19th June, 1834, is entitled to enter the same after six months from the date of the act. *Advice*, 258.
71. The option of entering either is lost only by neglecting to make the application within six months. *Ibid.*
72. Sales by the Creeks, where purchasers, either by force or fraud, abstract from them the purchase money, are fraudulent and void. *Advice*, 259.

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73. So, also, are sales approved by the President where the reservee was personated by other Indians; and patents may be withheld. *Ibid.*
74. It is the duty of the Executive to secure to all persons a fair and equal opportunity of purchasing the public lands. *Advice*, 274.
75. Lands that have been temporarily withheld from private sale should not be allowed to be entered until suitable notice has been given of the removal of the cause of suspension, unless applied for before suspension. *Ibid.*
76. The Treasury Department has no authority to require a certificate that notice has been given, or that lands are liable to entry; nor can the Treasurer refuse pay for a specific tract, unless he have official evidence that it is not subject to sale. *Ibid.*
77. If any good cause be known to the register, he may refuse to complete the entry. *Ibid.*
78. The President has the power to reserve from public sale any or all of certain mineral lands in Wisconsin, and may, if he deem it advisable, lease them. *Advice*, 277.
79. Where, from want of proper and necessary information, he shall have failed to make the necessary reservation prior to the public sale, it is competent for him then to direct the reservation. *Ibid.*
80. Citizens cannot acquire a right to enter lands which have been improperly withheld from private entry, after the close of a public sale at which they were offered, until after notice. *Ibid.*
81. The act of 24th April, 1820, and the instructions issued under it, directing the manner of subdividing fractional sections containing over 160 acres, did not require the absolute platting of every quarter or half quarter of which the section was susceptible; but contemplated the exercise of discretion so as to prevent small and inconvenient fractions of a fractional section. *Advice*, 281.
82. It is the duty of surveyors general to subdivide fractional sections in conformity to law, and without reference to the existence of the pre-emption acts of May 29, 1830, and June 19, 1834. *Ibid.*
83. It is the duty of surveyors general to divide fractional sections containing over 160 acres into lots approaching as nearly as practicable to the form and quantity of half-quarter sections; and it is competent for the department to direct the performance of the duty. *Advice*, 284.
84. The survey is to be made without reference to pre-emptions, but pre-emptors are entitled to a legal survey. *Ibid.*
85. A tender for more than the party is entitled to does not destroy the tender; it may be regarded as precautionary. *Ibid.*
86. It is proper, after tender made and entry defeated by fault of the officers of the government, to correct the error by ordering a correct course of procedure. *Ibid.*
87. Patents may issue directly to a white person being the assignee of a Creek reservee, to whom the tribe had assigned a portion of the twenty ninth sections reserved under the 6th article of the Creek treaty of 1832. *Advice*, 288.
88. An officer of the army of the United States, in actual service, may have a valid pre-emption claim as settler or occupant of public lands, although it may seem to be incompatible with the condition of an officer in actual service. *Advice*, 303.
89. As to the personal residence and inhabitancy on public lands necessary to confer the right of pre-emption, former opinions on the subject are referred to, indicating that where there is but a partial cultivation under the immediate personal direction of the claimant, as the head of a family, by himself, hired men, servants, or slaves, and a settlement and occupation actually intended to be made, and is subsequently made by the claimant, he is entitled to the benefit of the laws. *Advice*, 309.
90. Where the improvement is on a fractional section containing over 160 acres, the claimant may enter, in conformity with the legal subdivisions recognised

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- by the acts of 1830 and 1834, a quantity of land not exceeding 160 acres. *Advice*, 313.
91. A 40-acre lot created by the operation of the act of April 5, 1832, is not such a legal subdivision, and cannot be taken in addition to the fractional quarter containing the pre-emptor's improvement. *Ibid.*
 92. The third article of the circular of July 22, 1834, and the third and eight articles of the circular of October 21, 1834, are not inconsistent with the law. *Ibid.*
 93. Indians have not been conceded the natural capacity to hold absolute title to lands, except in cases specially provided for by treaty; wherefore, the title of the Brothertown Indians to the land secured to them by the treaties with the Menomonies is not a fee-simple, but only such a right of occupancy as was previously possessed by the Menomonies themselves. *Advice*, 322.
 94. Under the treaties of 1817 and 1819, with the Cherokees, the reserves therein could not properly locate their lands outside the limits of the cessions, respectively; but, as some of the reservations of 1817 were located within the lands ceded in 1819, and were included in the uncaded lands under the latter treaty, these cases are to stand on the same ground as other reservations under the treaty of 1817, and equally entitled, under the treaties of 1835 and 1836, to compensation with those who located within the cession of 1817. *Advice*, 326.
 95. But no provision has been made for those whose reservations, under treaties of 1817 and 1819, were located within the cessions of 1835 and 1836; and, as such reservations are not within the 13th article of the treaty of 1835-36, they were unauthorized, and are not to be paid for as improved lands; but the holders are only entitled to pay for their improvements. *Ibid.*
 96. Reservations claimed under former treaties, not being ceded by the first article of the last, are not within the words nor intentions of the 9th article of the last; hence the reservees who may be entitled to compensation under the 13th, cannot claim pay under the 9th article for improvements on the same reservations. *Ibid.*
 97. But those who were to receive grants for their reservations are entitled to pay for the soil and their improvements thereon. *Ibid.*
 98. The children of the reservees, under the 8th article of the treaty of 1817, were entitled to reservations in fee-simple. *Ibid.*
 99. The right to enter back lots is not limited to proprietors whose lands front on navigable streams. If there be a perennial flow of water, there may be rivers, creeks, or water courses, within the meaning of the law. *Advice*, 336.
 100. The register and receiver, under the power given to them in the 12th section of the act, may examine the claim of De Feriot, and the evidence on which it was founded, for the purpose of ascertaining whether it was founded on a real or fabricated grant, and also for the purpose of ascertaining whether or not the confirmation was fraudulently obtained; and, if satisfied that fraud has been practised, they ought not to make the survey nor issue the certificate. *De Feriot's case*, 343.
 101. The individual who appeared before the board of commissioners, and whose claim was favorably reported upon by them, (not the original grantee,) is to be regarded as the confirmee under the act of July 4, 1836, and is authorized to make the location. *Advice*, 350.
 102. Patents are unnecessary to complete title to an unsold portion of the confirmed claim. A grant may be as effectually made by law as by a patent issued in pursuance of law. *Ibid.*
 103. The location spoken of in the 2d and 3d sections of the act must be confined to one land district and made at one time; but the party may enter separate tracts, conformably to legal divisions and subdivisions, for which a patent must be issued. *Ibid.*
 104. A New Madrid location of lands upon a tract confirmed to the heirs of James Mackay, must yield to the title of the confirmees, as the "sale or other dis-

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- position" referred to in the 11th section of the act of May 26, 1824, is to be understood to mean a sale or disposal in conformity to law. *Advice*, 354.
105. Ordinary sales of lands afterwards confirmed to a Spanish claimant, must yield to the confirmed claim. *Ibid.*
 106. The proposed extension of the canal from Lake Erie to the Wabash, from the mouth of the Tippecanoe to Terre Haute, is authorized by the act of Congress; and when the same shall have been agreed on and located, the additional lands provided by the act, so far as the United States are in a condition to provide them, may be legally claimed by the State of Indiana. *Advice*, 358.
 107. But selections of land beyond the limits of five sections in width on each side of the extended portion of the canal, in lieu of land which has been sold or otherwise disposed of, cannot be made without the assent of Congress. *Ibid.*
 108. The residence of heads of Choctaw families who in due time signified to the agent their intention to remain and become citizens of the United States, or a valid excuse for non-residence, entitles them to grants pursuant to the treaty; and such grants when made are paramount to pre-emption and all other claims. *Advice*, 365.
 109. The War Department, however, should endeavor to avoid interference with the rights of settlers whenever it can be done consistently with the provisions of the treaty. *Ibid.*
 110. Land scrip issued in satisfaction of military bounty land warrants must be regarded as real estate, and to go upon the death of the holder to the heirs-at-law, and not to executors and administrators. *Advice*, 382.
 111. The removal of the Creek reservees from their reserved lands, without the intention of returning and occupying them as their place of residence, is an abandonment, which gives the right of possession and occupancy to the United States. *Advice*, 389.
 112. The right of the United States accrues and becomes complete immediately upon such abandonment. *Ibid.*
 113. The United States are bound by their treaty stipulations with France, and by the universal usage among civilized nations, to go on and perfect the title of the heirs of Thomas F. Reddick to a tract of land on the bank of the Mississippi, held under a Spanish grant and relinquished by act of Congress of 1st July, 1836, unless the same shall be taken by an older and better claim not emanating from the United States government; and no such title having been set up, a patent ought to issue to the said heirs. *Advice*, 398.
 114. On completion of payment for Creek reserves conveyed by the reservees to other persons, certified by some person appointed by the President for that purpose, and approved by the President himself, patents must issue to the purchasers. *Advice*, 413.
 115. It will not be a compliance with the treaty of 24th March, 1832, to issue patents in such cases where the right is controverted to the original reservees to abide the result of suits and to inure to the successful parties. *Ibid.*
 116. The plats returned to the General Land Office by surveyors general are evidence of the existence and general character of rivers, creeks, bays, &c., which the law requires to be marked upon them, and may be regarded as affording full proof for the purposes of settling pre-emptions and locations. *Advice*, 420.
 117. Mistakes in these plats may occur, and when they do, may be corrected; but with respect to transactions occurring and private rights acquired upon the faith of the accuracy of the plats, and before the correction of their mistakes, they should be left undisturbed wherever it is possible. *Ibid.*
 118. Transfers of reservations by assignees, whose assignments express them as a firm, are not valid when executed by one member thereof, but only when executed by all, unless the partner assigning exhibit authority to assign from all. *Advice*, 423.
 119. But where the reservee assigned to a firm, as to "M. W. Perry & Co.," and the transfer by the firm was signed in that manner, the assignment is valid, and the patent may issue to the assignee. *Ibid.*

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120. Where there are two assignors, and the names of both to the assignment are in the same handwriting, the assignment is invalid as to him who did not sign, unless the other exhibit authority. *Ibid.*
121. Where approved contracts are endorsed in blank, with the names of first purchasers endorsed thereon, the endorsement of the names of the purchasers on the approved contracts is evidence of their having disposed of them; and possession by others is sufficient evidence to warrant the issuance of the patents to those having possession of the approved contracts. *Ibid.*
122. These assignments are not required to be acknowledged, and ought not to be made subject to any rule made after they were executed. *Ibid.*
123. Possession of a contract is not sufficient evidence of a legal transfer. *Ibid.*
124. The inhabitants of the village of St. Charles, under the laws of the 13th June, 1812, the 26th May, 1824, and the 27th January, 1831, have precedence and priority over Peter Chouteau, whose claim to land was confirmed 4th July, 1836, and the claim of the latter must be located elsewhere upon the public domain. *Advice*, 427.
125. All sales and locations made of lands claimed under unconfirmed titles derived from France or Spain, between the 26th of May, 1830, and the 9th of July, 1832, are valid. *Ibid.*
126. If it be claimed that this construction violates treaty obligations, the answer is, that the parties must go to the judiciary for a decision declaring void an act of Congress, not to the Executive department. *Ibid.*
127. Where a lot of land offered at auction at a public land sale was struck off to A, who advanced the money, and took a receipt therefor, and B, on the same day, offered evidence to prove that he nodded to the auctioneer, and that his nod was equivalent to a bid for said land above that of A, and that, thereupon, the land officers put up the land again on a subsequent day, and struck off the same to C, who conveyed it to B, who disputes A's title—*HEXON*, that if B intended his nod at the first sale to be a bid above A, he should have promptly disclosed it at the time, and invoked the land officers to remedy the inobservance or neglect of the auctioneer; and that, as this was not done, the patent must issue to A, to whom it was struck off at the first sale. *Advice*, 448.
128. Back pre-emptions cannot be lawfully claimed by those who were not owners of land on a river, creek, &c., at the time of the approval of the act of June 15, 1832; and individuals entitled to lands, but who had not located them at the date of said act, cannot be considered to have perfected a title to any specific lands so as to be regarded as owners within the meaning of the act. *Advice*, 452.
129. The land in controversy in this case was not subject to pre-emption, for the reason that the claimant did not own the front lands in 1832. *Ibid.*
130. The right of pre-emption attaches only to such public lands as are subject to the operation of the general land system of the country, and not to those which have, by act of Congress, been taken out of the class of public lands and appropriated to specific objects, or reserved for particular purposes, as for the cultivation of the vine and olive. *Advice*, 456.
131. The Wyandot nation of Indians have the authority to treat with the United States respecting the reservation of twelve miles square at and about Upper Sandusky, in the State of Ohio, as the supplement to the treaty of 1817 reinvested them with their title in trust. *Advice*, 458.
132. An assignment by P. P. Pitchlynn of a reservation in the treaty in favor of Peter Pitchlynn, where there is no doubt of the identity of the person, is good; as the law knows of but one christain name. *Advice*, 467.
133. A patent for land may issue to John McGilvry, as the head of a family registered by the name of John McGilvry, where there is no doubt of the identity of the person; as the orthography and sound do not vary so materially as to affect the grant. *Ibid.*
134. Scrip may be issued on a Virginia land warrant dated subsequent to September 1, 1835, in cases where it shall appear that such warrant is not an

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- original one, but was only issued in place of one issued improvidently to wrong heirs prior to September 1, 1835, and cancelled by Virginia, as it is in the nature of an exchange warrant, and may be treated as if issued within the time provided by law. *Advice*, 499.
135. The report of the land officers of the 20th December, 1817, and confirmatory act of Congress of the 11th May, 1820, ought to be regarded as confirming the title of Morgan to the full extent of his grant issued by Governor Galvez on the 24th of January, 1777. *Advice*, 501.
136. The claim of the heirs of Mackay, founded on a special grant made in the year 1799, containing an exact description of the land, and accompanied with uninterrupted possession ever after, having been submitted to the district court of Missouri, and by appeal to the Supreme Court of the United States, and adjudged to be a valid and lawful grant, a patent should issue to the heirs for it, notwithstanding New Madrid sufferers may have located upon it. *Advice*, 506.
137. But, to protect any adverse rights that may exist, the patent should contain a clause reserving the rights now or heretofore existing, of all just and legal adverse claimants to the whole or any portion of the land patented. *Ibid.*
138. Where a Choctaw reservee conveyed his reservation to D., in trust, to sell and apply the proceeds to the payment of a debt owing by the reservee to A. and R., who thereupon sold a portion of the land, and with the proceeds paid a part of the said debt; and, at this stage of the affair, the reservee died leaving two children, whose guardian, under pretence that he was acting for the children, bought the residue at a sum far below its value, who, after taking H. into partnership with him, conjointly with him sold the land to Banks and Lewis, without the consent of the President, and refused to pay over any part of the proceeds to said children—*DECIDED*, that the President ought not to give his approval to the sale to said Banks and Lewis, as it would probably deprive the children of their inheritance. *Advice*, 518.
139. The deficiency of lands granted Ohio in act of 29th May, 1830, to make up the full quantity previously granted for the construction of a canal from Lake Erie to the Wabash, must be supplied from the alternate sections reserved to the United States, or out of other lands in the neighborhood near to the canal. *Advice*, 553.
140. Those parts of sections which are cut by the parallel line, five miles distant from the canal, may be located; and quantities equal to the computed area of the cut sections may be located according to any of the usually recognised minor subdivisions of a section among the alternate sections accruing to the State along the exterior limits of the belt. *Ibid.*
141. If obstacles shall be found to exist to the location of sufficient land on the exterior limits of the belt in minor divisions, the compliment may be made up from full alternate sections. *Ibid.*
142. But no sections nor subdivisions are to be excluded because they happen to be cut by and protrude beyond the exterior line of the belt. *Ibid.*
143. The heirs of Captain Kirkwood, who entered the revolutionary service in the Delaware regiment, in the year 1776, and continued in service until the end of the war, are entitled to scrip on a warrant issued for three hundred acres of land on account of his services, whether they were properly entitled to scrip on a warrant for four thousand acres issued by the executive of Virginia or not. *Advice*, 556.
144. It appears that, by a construction given to certain acts and resolution of Congress, and of Virginia, such of the troops from other States as were, in the course of the war, attached to the Virginia State establishment, and continued in service to the end thereof, were entitled to the same bounty from Virginia as if they were originally raised in that State. *Ibid.*
145. In case the Secretary of the Treasury shall have any good reason to believe that such warrants have been issued in error or mistake, he may suspend the issue of scrip; or, if issued, cause measures to be taken to have it cancelled. *Ibid.*

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146. The dwelling-house of a pre-emptor being on a fractional section and his improvements extending over upon another fractional section and upon an entire one, his right of pre-emption cannot be admitted to the three, but is limited to his domicile and one of the other two sections of land. *Advice*, 564.
147. The President may authorize the marshal to remove all persons who have fixed their residences on the public reservations, without authority, beyond the lines of the posts of Tampa Bay, for the purpose of selling liquor to the troops, and the suspected purpose of supplying the Indians with ammunition. *Advice*, 566.
148. The claim of Bartholomew Pellerin to a patent for seventeen thousand and eighty-four arpens of land in Mississippi, on pretence that his title is founded on a legal British grant made previous to 1783, and recognised and confirmed by the Spanish government in 1810, cannot be recognised at the General Land Office. *Advice*, 569.
149. His claim having been reported and confirmed as one founded on a private conveyance for twelve hundred and eighty acres only, as a donation, a patent for that quantity only can issue, unless further legislation shall authorize it. *Ibid.*
150. The rights of pre-emption, if otherwise mature, may be allowed to lands reserved from sale under the supposition that they fell within the limits of the grant in aid of the Milwaukie and Rock River canal, but subsequently found not to be included. *Advice*, 577.
151. Where Creek reserves died within the five years during which their reserves were to be withheld from sale, and the lawful administrators sold the reserves, and paid over the proceeds (less the expenses) to the Indian widows, as the heirs, and the question of other heirs being now raised, in opposition to the confirmation of the sales to the purchasers, who have paid the consideration money therefor once in full—~~decided~~, that the purchasers are entitled to the confirmations which they ask, and should not be required to pay a second time any portion of the purchase money. *Advice*, 578.
152. If the distribution of the proceeds were illegal, it ought in nowise to affect the bona fide purchasers. *Ibid.*
153. The approval by the President of the location of certain lots by reservees under the Winnebago treaty of 1st August, 1829, vests a title in the reservees, that is superior to that of certain Polish exiles who located 18th April, 1836, under act of 30th June, 1834. *Advice*, 584.
154. Heads of Creek families who otherwise would be entitled to a patent for land in Alabama, have not forfeited their right to the same by having become residents and citizens of Georgia, before the expiration of five years from the time when their reservations were selected. *Advice*, 585.
155. The President of the United States may properly confirm sales of Creek reservations made by administrators pursuant to the orders of courts having jurisdiction, whether the distribution of the proceeds among the heirs shall have been correctly made or not; provided the purchases shall have paid in the purchase-money in good faith to the administrators or legal representatives. *Advice*, 596.
156. But where purchasers have withheld any portion of the purchase-money on any pretence, or the administrators themselves were the purchasers, and have not accounted for the purchase-money, sales ought not to be confirmed. *Ibid.*
157. Where an assignee in blank of the floating right of pre-emption to a specific quantity of land is in conflict with an assignee of the same right which has been actually located, and the Commissioner of the General Land Office is satisfied that the assignment in blank is not clearly fraudulent, he ought to issue the patent to the original pre-emptor, leaving the conflicting claims to be settled by courts of justice. *Advice*, 608.
158. The confirmatory act of 2d December, 1833, gave to the sons of Benito Vasquez an absolute claim to lands; but the same was a floating right, and cannot be located on any of the public lands of the United States, until further legislation shall be had in the premises. *Advice*, 615.

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159. The omission in the act to make suitable provision for the location was doubtless accidental, yet it can be rectified only by Congress. *Ibid.*
160. The right of Peter H. Hobart, who derived title from John McDonald, to a tract of land on Bayou Sara, in Alabama, was confirmed by the act of 2d March, 1829, to the extent of twelve hundred and eighty acres. *Advice*, 618.
161. The provisions of the act entitling a conferee to a patent are positive; and it ought to be issued for the tract as located, unless it shall be made satisfactorily to appear that the bayou, which is the chief landmark, does not exist at the place described. *Ibid.*
162. It is a sufficient compliance with the provisions of the act of July 4, 1836, for the engrossing clerk to write the name of the President to patents, and for the secretary thereafter to attest them by his signature. *Advice*, 623.
163. All the duties respecting the execution of patents, except the attestation, are ministerial, and may be performed either by the clerks or by the secretary. *Ibid.*
164. The Seneca Indians are entitled to the possession of their hunting-grounds, as well as their cultivated lands, until the time limited by the treaty with them for their voluntary removal. *Advice*, 624.
165. The countersignature of the recorder of land patents, and seal of the office thereto attached, constitute a sufficient authentication of a patent for land. *Advice*, 630.
166. Patents for reserve lands under the Creek treaty of 1832 are to be issued to purchasers, owners, assignees, or transferees; and claimants must show themselves to be within the description of persons entitled, by exhibiting authentic evidence of the fact. *Advice*, 644.
167. The transfer to the claimant, by the attorney-in-fact of the Columbus Land Company, unaccompanied with evidence of the title of said company, is not sufficient to authorize the issuing of a patent to him. *Ibid.*
168. But a succession of assignments endorsed on the original deed, if accompanied with satisfactory proof of genuineness and fairness, is sufficient to authorize the issuing of a patent. *Ibid.*
169. Transfers and assignments by agents of a land company, acting within the scope of their authority, are valid; yet, before the Commissioner of the Land Office gives effect to them; he should have satisfactory proof that such agents have acted within the compass of their authority. *Ibid.*
170. The Commissioner of the General Land Office properly refused to issue a patent for land entered by Governor Shannon in Ohio, and withdrawn from private entry in order to provide for executing the grant by Congress, by act of 24th May, 1828, of lands to the State of Ohio, for the purpose of aiding that State to extend the Miami canal from Dayton to Lake Erie, because it did not appear whether or not the land for which the patent was claimed was situated within the limits of the reservations, and because, if it was, the requisite notice had not been given by the register and receiver, as provided for in the regulations concerning the public lands. *Advice*, 650.
171. The execution of a patent for land to a soldier in the war of 1812, by the Commissioner of the General Land Office, passes the title, although the same had not been delivered to the patentee. *Advice*, 653.
172. It is a matter of discretion with the department as to whom the patent should be delivered. *Ibid.*
173. The disallowance of a pre-emption claim made by an assignee of a certificate of purchase, by the register and receiver, who had competent authority to judge of its validity, on grounds satisfactory to them that it was unfounded, is conclusive against the claim. *Advice*, 663.
174. The acquittal of McDonald and Norton, for perjury, charged to have been committed in swearing to the affidavit upon which the claim of pre-emption was grounded, is not conclusive upon the United States in the land department. *Ibid.*
175. It has been the position of the United States, that the acts of 26th of March,

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- 1804, erecting Louisiana into two Territories, and that of the 2d March, 1805, for ascertaining and adjusting the titles and claims to lands within the Territory of Orleans and the district of Louisiana; extended to the country west of the Perdido, to which the United States have always asserted, and at length enforced their right under the treaty with France in 1803, and that between the government and Spain in 1800. *Advice*, 697.
176. The Indian right of occupancy having been fairly extinguished by treaty, and the government having come to be in full and complete possession of the lands in question, it had become both expedient and necessary that they should be surveyed and put into market. *Ibid.*
177. The surveyor of lands of the United States south of Tennessee was authorized to cause the surveys to be made; and his approval of the plats thereof is a sufficient authentication of both the survey and plats. *Ibid.*
178. There has been no form of the surveyor's approval of plats prescribed. The substance and spirit of the whole policy in respect to approvals were, that the surveyor should not only cause the lands to be surveyed and platted, but should see to it and satisfy himself that the plats corresponded with the field notes; and when satisfied, to return the plats to the proper office. *Ibid.*
179. The President had a discretionary authority to proclaim these lands for sale immediately upon being informed that the surveys were made and proper land officers appointed to conduct them. *Ibid.*
180. Purchasers are chargeable with notice of the law respecting all former grants by Spain and France, and in relation to pre-emptions. *Ibid.*
181. In the case of an erroneous sale, in any respect other than failure of consideration by reason of want of title in the United States, the Secretary of the Treasury has no power to refund the purchase money, but relief must be sought at the hands of Congress. *Ibid.*
182. Nor ought a patent to issue so long as the surveys remain confused; but the same may be properly suspended until a report can be had, or the facts concerning the lands be more fully ascertained. *Ibid.*
183. The error as to the date of a certain report of the Commissioner of the Land Office, embracing the Maison Rouge claim, set out in a confirmatory act of 29th April, 1816, (being December 4, 1812, when it should read December 14, 1812,) is not fatal to claims mentioned in the said report. *Advice*, 714.
184. The "league square" is the extent of the satisfaction granted to claimants under the act of 29th of April, 1816; and, whatever may be the extent of the claim, this satisfaction may be had under the act. *Ibid.*
185. The confirmees under the treaty with France under which their claims are asserted, do not claim the *dominium* of the civil law, but the doing of what is necessary to complete title and convey property. The lands to which they lay claim form a part of the public domain; and, although the United States acknowledge themselves bound to provide for them, the whole subject remains in contract. *Advice*, 721.
186. Specific performance of a contract for the sale of lands is an artificial rule altogether unknown to the common law. *Ibid.*
187. The acts of 1824 and 1836, which confirm the French and Spanish grants, are not required to be carried into specific performance, if it cannot be done without unsettling titles in the country in question. *Ibid.*
188. Congress doubtless legislated with a view to heal evils, of which an indiscriminate performance of the grants in question has been so prolific. *Ibid.*
189. Congress reserved to itself, from the beginning, the power of executing the treaty in good faith, but with a sound discretion and due regard to the quiet of titles; and endeavor to reserve from sale and occupation all the lands subject to claim under foreign grants. *Ibid.*
190. The act of 1836 is a legislative confirmation of all voidable locations under any law of the United States, or sales by the United States of any description whatever. *Ibid.*
191. Prior confirmations, school sections, ordinary sales prior to the confirmatory act of July 4, 1836, and the New Madrid locations under the act of Feb-

LANDS, PUBLIC (*Continued.*)

- ruary 17, 1815, are valid as against the claim confirmed by the act of July 4, 1836. *Ibid.*
192. The individuals who appeared as claimants before the commissioners, and who have obtained their favorable decision, are the persons who are to be recognised at the General Land Office as the confirmees under the act of 1836. *Ibid.*
193. Claimants who have been interfered with by prior valid claims may locate the quantity taken from them by the interference in question on separate tracts, conforming to legal divisions and subdivisions of the same. *Ibid.*
194. The power is sufficiently implied to authorize the issuing of patents for the portion of the confirmed private claims not interfered with by prior valid claims. *Ibid.*
195. Congress has given to the Land Office authority, and has prescribed to it as a duty, to treat claims made under the treaty as valid up to the extent of a league square, and no more. *Advice*, 737.
196. The claim to all beyond a league square is unconfirmed, and stands, in every respect, as if the act of Congress had not been passed, except that the fact, that Congress has refused to acknowledge it further, has the effect to raise a presumption that Congress, by partial confirmation, did not mean to admit the justice of the claim, but only to buy its peace; and that the executive department must regard the claim, whatever may be its extent, as satisfied by the acceptance of a league square. *Ibid.*

LOCATION.

See **PUBLIC LANDS.**

MARINE CORPS.

1. By the application of the act of the 2d of March, 1827, to the marine corps, an assistant quartermaster of marines was entitled, prior to the 30th of June, 1834, to all the extra pay and emoluments allowed to an assistant quartermaster in the army similarly situated. *Advice*, 266.
2. A captain or subaltern in the command of a detachment of marines is entitled to receive the ten dollars per month as provided by the said act for the officer commanding a company in the army. *Ibid.*
3. An officer in the actual command of any number of men sufficiently large to constitute a detachment of marines, according to the usage of the Navy Department, will entitle him to the allowance given in the 2d section of the act of March 2, 1827. *Advice*, 342.

METROPOLIS.

See **WASHINGTON.**

MIDSHIPMEN.

1. Midshipmen are not exempt from arrest; the proper construction of the act of the 11th of July, 1798, for establishing and organizing the marine corps, failing to include them in the exemptions made. *Advice*, 119.

MILITARY ACADEMY.

See **ACADEMY.**

MILITIA.

1. The act of 28th May, 1836, does not extend to the pay and other allowances to be made to the militia or volunteers, which, by the second section, are placed on the same footing with those of militia and volunteers ordered into service by orders from the War Department. Of expenses incurred and supplies furnished, not of the like nature with those specially named in the abstract, only those are to be allowed which were known to the military service, having reference, in the cases both of expenses and supplies, to the character of each corps. *Advice*, 162.
2. There are no acts of Congress providing pay, rations, and expenses to militia called out by State or Territorial authority, but disbanded without their having been employed or mustered into the service of the United States previous to their dismissal; such cases, as they have arisen, having been, from time to time, specially provided for. *Advice*, 528.

MILITIA (*Continued.*)

3. The government is not bound to pay such of the Florida militia as disbanded voluntarily, and without authority, and refused to render service. *Advice*, 687.
4. Nor is the government bound to pay such as were mustered, and then directed to repair to their homes, to remain in readiness to serve at a moment's notice. *Ibid.*
5. The disbanding was a virtual discharge from *actual* service; and, during such discharge, they were not entitled to pay as soldiers of the United States. *Ibid.*

NEUTRALITY.

1. The building of two schooners of war in New York for the Mexican government, and being about to be furnished with guns and the usual military equipment, is clearly within the 3d section of the act of 1818. *Advice*, 739.
2. These vessels having been built expressly for the service of Mexico, which is waging war against Texas, the persons are liable to the penalties of the act, and the vessels to forfeiture. *Ibid.*
3. The policy of this country is, and ever has been, perfect neutrality and non-interference in the quarrels of other nations. *Ibid.*
4. The foregoing opinion is reconsidered on the statement that the vessels were not delivered, nor the property changed, within our jurisdiction; but were sent out of port under control of our own citizens unarmed, and that every possible precaution has been taken to insure pacific conduct upon the high seas. The doctrine is re-affirmed, but it does not so fully apply to the case now presented as was supposed from the first statement of the case. *Advice*, 741.
5. Nevertheless, although the sale is made abroad, if the vessels were equipped by American citizens within the United States for belligerent purposes, and for a nation belligerent to another with which ours is at peace, knowing the purposes for which they are to be employed, it is insisted that the equipping is repugnant to the law of 1818. *Ibid.*
6. All trading with a belligerent in ships-of-war already equipped for service is repugnant to the settled policy of the United States, and to the solemn declaration of Congress in the act of 1818. *Ibid.*
7. For, however popular opinion may have changed on so important a subject, the act of 1818, like that of 1794, was intended to secure, beyond all risk of violation, the neutral and pacific policy which they consecrate of our fundamental law. *Ibid.*
8. The taking of a bond is recommended in this case under the 10th section of the act of Congress; yet all equipping within our jurisdiction of vessels of war for a belligerent, by an American citizen, knowing the purposes for which they are to be employed, is unlawful. *Ibid.*

OHIO.

See PAYMENTS.

ORLEANS.

See PUBLIC LANDS.

PARDONS.

1. The power of the Executive to grant reprieves and pardons extends to the remission of fines, penalties, and forfeitures, and costs in criminal cases, and may be exercised in degrees at different times at the discretion of the incumbent of the office. *Advice*, 418.
2. A portion of a sentence may be remitted at one time, and another portion of it at another time, and by another Executive. *Ibid.*
3. And the same power is possessed by the Executive over a judgment after security for its payment shall have been given, as before. *Ibid.*
4. The pardoning power vested in the President extends to fines imposed upon individuals for conduct adjudged to be contempt of the circuit courts. *Advice*, 622.

PATENTS FOR LANDS.

See PUBLIC LANDS.

PATENTS FOR INVENTIONS.

1. Unless there be some error in the specification arising from inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, the patentee cannot surrender a patent which includes several distinct improvements and take out several new ones. *Advice*, 165.
2. Extension of patents for useful inventions may be granted to the legal representatives of original patentees, where such patentees, if living, would be entitled thereto. *Advice*, 446.
3. Verifications and depositions in foreign countries to be made under the provisions of the sixth section of the act of July 4, 1836, before patents can issue, should not be made before consuls, but before competent magistrates of the country where they shall be taken, and authenticated by the consul. *Advice*, 532.
4. Any abrogation of oaths in the patent laws of England will not affect the question here; all conditions requisite to a patent in this country must be complied with according to the laws of Congress. *Ibid*.
5. Applications for extensions of patents for inventions must be made to the Commissioner a sufficient time before the expiration of the term for which they were issued, to enable him to give the notice contemplated by the act of 4th of July, 1836, to the public in that section of the country most interested adversely to them. *Advice*, 594.
6. Patentees who neglect to make seasonable applications for extensions must forego the advantages which such extensions confer. *Ibid*.

PAY.

See COMPENSATION.

PAYMASTERS.

1. The proviso of the act of the 3d March, 1835, inhibiting the payment of percentage to officers of the army for any service or duty, unless authorized by law, is a permanent provision, and cannot be avoided except by an express enactment; wherefore, a commission cannot now be allowed to Paymaster Kirby on moneys paid out by him to the militia and volunteers serving in Florida. *Advice*, 153.

PAYMENTS.

1. It is the duty of collectors of customs to pay the duties collected by them into the treasury, although some of them may have been paid under protest, and importers shall have prosecuted to recover them back. *Advice*, 392.
2. Payments directed by Congress to be made to M. and T. should be made by the Secretary of the Treasury to them or their constituted attorney, notwithstanding the interposition of claims by third persons grounded on assignments, insolvent or other proceedings, anterior to the passage of the act directing the payment. *Advice*, 533.
3. Where the contractor for parchments for land patents delivered a portion of them in printed form and received payment therefor, augmented by the price of the printing—*DECIDED*, that the amount thus erroneously paid may be deducted from other sums yet due him. *Advice*, 539.
4. If satisfied of the correctness of the account furnished by the commissioners of the school fund in Ohio, the Secretary of the Treasury may allow the three per cent. to accrue to Ohio thereon—no further proof being required by the act of 1820. *Advice*, 567.
5. Where the acceptance of a Postmaster General had been given in payment of an account for work done, and the amount thereof had been recharged by a subsequent Postmaster General—*DECIDED*, that the amount of the acceptance ought not to be deducted from an account current for other work. *Advice*, 624.
6. Where a receiver of public moneys at Kalamazoo received in payment for public lands the notes of a specie-paying bank that afterwards suspended specie-payments, and then took from the bank a draft on another bank which was returned dishonored; and a receiver of assets having been appointed under the laws of Michigan, with whom the receiver of public moneys filed a claim for this debt—*HELD*, that, notwithstanding the acts of the

PAYMENTS (*Continued.*)

latter, the legal priority of the United States to payment still exists. *Advice*, 625.

7. The first section of the act of 4th February, 1819, entitled "An act to authorize the payment in certain cases, on account of treasury notes which have been lost or destroyed," applies to notes issued from 1837 to 1841, inclusive. *Advice*, 634.

PENSIONS.

1. Pensions to widows must be applied for during widowhood; if they neglect to apply for them before their marriage, they are concluded. *Advice*, 36.
2. Field-officers, captains, and subalterns, who commanded in the battalions of Virginia on the continental establishment, or who served in the battalions raised for the immediate defence of the State, or of the United States, and all such officers as became supernumerary on the reduction of any of said battalions, and who again entered the service, when required, in the same or any higher rank, and continued therein until the end of the war, were entitled to half-pay under the laws of that State, although not residents of Virginia. *Advice*, 37.
3. The accuracy of the construction given by Mr. Wirt to the act of the 15th May, 1820, to revive and continue in force an act to provide for persons who were disabled by known wounds received in the revolutionary war, and for other purposes, is doubted. *Advice*, 58.
4. The rights of the surviving husband in and to arrears, depend upon the laws of the State where the parties resided at the time of the wife's demise. *Advice*, 68.
5. The widow of a master-at-arms in the navy of the United States who died in consequence of a fall through the hatchway of the United States ship Ontario, (who was an officer within the act of 1813,) is entitled to a pension. *Advice*, 71.
6. If the husband is to be regarded only as a seaman, and the widow not within the act of 1813, she is referred to the act of 3d March, 1817, as all rights under that law are saved, although the act has been since repealed. *Ibid.*
7. The right of a widow under the act of Congress to so much money per annum on the happening of a certain event is vested, and not defeated by her subsequent marriage only from the time of the marriage. *Ibid.*
8. The result is that the applicant is entitled to a pension of ten years prior to the act of the 30th of June, 1834, and under it to a pension of five years, to commence on the day of the passage thereof. *Ibid.*
9. The act of 20th May, 1836, placed pensioners on precisely the same footing as if the act to prevent defalcations, &c., had never been passed; consequently, all moneys which have been withheld from pensioners under the construction theretofore given to the act to prevent defalcations, ought to be refunded. *Advice*, 135.
10. The children of soldiers embraced in the first section of the act of the 4th of July, 1836, who have died, leaving widows and children, and the widow having married again before the passage of the act—~~namely~~, that the children are entitled to its benefits within the equity of the law. *Advice*, 147.
11. The children of widows pensioned under the third section of the act of July 4, 1836, who shall have died leaving a balance due them from the government, are entitled to such balance to the exclusion of executors and administrators. *Advice*, 151.
12. Pensions to widows and orphans granted by the first section of the act of the 4th July, 1836, commence from the day when the bill was approved by the President in all cases in which the death of the party serving occurred anterior to that day; in subsequent cases, from the death of the party. *Advice*, 152.
13. The act embraces the cases of widows and orphans whose husbands and fathers might subsequently die, as well as those who did die before its passage. *Ibid.*
14. Mrs. Perry is not excluded by the act of 1821 from the benefit of the act of 1817, and her rights vested under it; so that the act first mentioned is to be

PENSIONS (*Continued.*)

- regarded as a grant to her and her family, over and above her pension under the last-mentioned act. *Advice*, 158.
15. Widows of officers, seamen, or marines are not entitled to pensions under the act of the 3d of March, 1837, who remarried before the passage of the act. *Advice*, 194.
 16. Children of decedent officers, &c., whose widows married before the passage of the act, are entitled to the half-pay granted by it until they arrive at the age of twenty-one years. *Ibid.*
 17. The widows of navy agents are not entitled to pensions under the act of the 30th of June, 1834, concerning naval pensions and the navy pension fund. *Advice*, 196.
 18. Under the act of 3d March, 1837, the daughter of a deceased sailingmaster, who was paid a pension under the act of 3d March, 1817, until she was sixteen years old, is now entitled to five years' additional pension, notwithstanding she is now over the age of twenty-one years. *Advice*, 197.
 19. Where the widow of an officer of the navy died before the passage of the act of 1837, her representatives can take nothing by the act, as no right to a pension vested in her. *Advice*, 199.
 20. Widows of officers, seamen, or marines, who remarried before the passage of the act of 3d March, 1837, are not entitled to pensions under that act, but their children are. *Advice*, 200.
 21. As there was a joint resolution passed for the relief of Mrs. Decatur on the same day of the passage of the act for the more equitable administration of the navy pension fund, she must elect under which she will take, for but one pension can be allowed her. *Advice*, 200.
 22. Grandchildren are not included in the law for the more equitable administration of the navy pension fund. *Advice*, 201.
 23. But the children (the widow being dead) take in equal moieties from the death of the father until the death of one of them, or until they arrive at the age of twenty-one years. Where one of the children died before the other arrived at the age of twenty-one, the latter is entitled to the full pension from her death until that time. *Ibid.*
 24. Where the soldier shall have died before the 7th of June, 1832, and subsequent to the 4th of March, 1831, leaving a widow who deised before the former date, the children of the soldier, not of the widow, are entitled to the pension. *Advice*, 202.
 25. The third section of the act of the 4th of July, 1836, granting half-pay to widows or orphans, where their husbands and fathers have died of wounds received in the military service of the United States, does not provide for widows of officers and soldiers who have died since the passage of the act. *Advice*, 203.
 26. It does extend to the widows of officers who were living at the time when the act of June 7, 1832, was passed. *Ibid.*
 27. The right of a widow to a pension under the act is a vested interest that is not defeated by her neglect to apply for it; and it goes to her personal representatives at her death, there being no special provision giving it a different direction. *Ibid.*
 28. Where the husband received a pension at his death, the pension of the widow under the act of the 4th July, 1836, commences only from that date. *Ibid.*
 29. The act of the 3d of March, 1837, for the more equitable administration of the navy pension fund, ought not to be so construed as to include cases where the death occurred anterior to the date of the law by which the fund was established. *Advice*, 246.
 30. The second section of the act of 3d March, 1837, for the more equitable administration of the navy pension fund, adopts the pay of the navy as it existed on the 1st day of January, 1835, as the standard for all cases coming within that section. *Advice*, 291.
 31. A steward serving on board a ship-of-war is borne on the ship's books as one of the crew, and as such is amenable to martial law, and is therefore a sea-

PENSIONS (*Continued.*)

- man; and, under the proper circumstances, his widow is entitled to a pension. *Advice*, 292.
32. Under the act of 1837 it is, but under the acts of 1813 and 1814 it is not necessary to be made to appear that the death occurred in the naval service, provided it appear to have been occasioned by a wound received whilst in the service and line of duty. *Advice*, 324.
 33. Upon a re-examination of the several acts giving pensions to the widows and children of officers having died of wounds received whilst in the line of their duty, it is *decided* that the death must have occurred whilst the officer was in service in order to entitle the widow and children to the bounty. *Advice*, 338.
 34. Widows who are on the pension roll and receiving pensions under the 3d section of the act of the 4th of July, 1836, are not entitled to pensions under the act of July 7, 1838. *Advice*, 367.
 35. The act of 23d April, 1800, does not authorize pensions for wounds received in the line of duty prior to the passage of the act; nor can the act of 3d March, 1837, be construed to embrace such cases. *Advice*, 373.
 36. Widows of revolutionary soldiers whose first marriage took place after the expiration of the last period of their service, and before January 1, 1794, who remarried anterior to the passage of the act of July 7, 1838, are not entitled, to pensions. *Advice*, 376.
 37. Widows and children of paymasters of the army who shall have died while in service, by reason of wounds received in actual service, are entitled to the benefit of the fifteenth section of the act of the 16th of March, 1802, fixing the military peace establishment. *Advice*, 434.
 38. Arrears of a pension due a navy pensioner at the time of his death must be paid over to his legal representatives. It does not revert to the navy pension fund. *Advice*, 435.
 39. The widow of a surgeon in the navy who was commissioned in 1811, resigned in 1824, reappointed in 1827, and who died in the service in 1832, is entitled, in respect to the time which is to determine its amount, to a pension only under the the last appointment. *Advice*, 468.
 40. The act of March 3, 1837, and the joint resolution of July 7, 1838, have so far modified the act of 1836, that widows of revolutionary soldiers, who, having remarried, are again widows, irrespective of the date of the death of the second husband, or whether the second husband were a revolutionary soldier or not, are entitled to half-pay; provided said widows are otherwise entitled to the same. *Advice*, 477.
 41. Where an act of Congress directed the Secretary of War to place the name of a widow of a revolutionary soldier, who was a pensioner, upon the roll of pensions at the same rate which her husband received, to commence at a date antecedent to the passage of the act; and it is discovered that she actually died before the passage of the act, leaving children surviving—*decided*, that the payment be made to the children according to the provisions of the act of 2d March, 1829. *Advice*, 541.
 42. The shares of any absent children should be reserved until the right of the others to take as survivors shall have been established. *Ibid.*

PIRACY.

1. A Texian armed schooner cannot be treated as a pirate under the act of 30th April, 1790, for capturing an American merchantman, on the alleged ground that she was laden with provisions, stores, and munitions of war for the use of the army of Mexico, with the government of which Texas, at the time, was in a state of revolt and civil war. *Advice*, 120.

POSTMASTER GENERAL.

1. The act of a Postmaster General in making extra allowances to mail contractors in consequence of alterations made, after the execution of the contract, in the frequency and speed of the conveyances used for transportation, and on account of the increased weight of the mailed matter, are not, where the account is still open, conclusive upon his successor; on the contrary, the latter possesses competent authority to look into such allowances, and

POSTMASTER GENERAL (*Continued.*)

- where he finds them to have been founded on material errors of law or fact, to correct them as justice shall appear to require. *Case of Stockton & Stokes*, 1.
2. Postmasters General are merely agents of government, with limited authority; and none of their acts, except those which are found to be within the scope of their authority and conformable to law, are obligatory upon the government. Contractors with them are chargeable with knowledge of the law, and must be presumed to be acquainted with the extent of their powers, and consequently with any departure from them in respect to contracts for transportation of the mails; and cannot, therefore, legally claim any benefit under acts done in contravention of law; for such are void from the beginning, and no legal right can be founded upon them. *Ibid.*
 3. But, although Postmasters General have no authority to bind their successors in matters of purely public concernment, the case is different in respect to transactions with individuals. Their authorized contracts with individuals, when not affected by fraud or material error, are obligatory upon successors—the change of incumbents not in anywise affecting nor impairing the rights of the contractors. But the incapacity to vary the contracts of predecessors in office is occasioned by the obligatory force of the contracts themselves—a force as operative, however, upon the officer who made them, as upon his successors—and not because they were made by predecessors. Frauds and material errors, however, may as lawfully be inquired into by successors as by him or them who shall have made the contracts. *Ibid.*
 4. Contracts to carry the mail of the United States, without stipulation as to its weight, include the whole mail accruing between the *termini* named therein, or coming into it from other routes, according to the arrangement contemplated when they are made; and, if justice shall demand extra allowance on account of the increased weight, it must be sought of Congress, and not of the Postmaster General. *Ibid.*
 5. If extra compensation to contractors shall have been paid by one Postmaster General, without the sanction of an act of Congress, the money so paid may be recovered back. *Ibid.*
 6. The circuit court of the District of Columbia is not invested with authority to issue a mandamus against the Postmaster General to compel him to execute an act of Congress in a particular way. *Stokes' case*, 236.
 7. Where one of two or more contractors for transporting the United States mail shall have been guilty of a violation of the twenty-eighth section of the act of the 2d July, 1836, changing the organization of the Post Office Department, and providing more effectually for the settlement of the accounts thereof, the Postmaster General may annul the contract and relet the route according to law. *Advice*, 436.
 8. Where proposals, in the usual form, for the transportation of the mail between certain specified points, had been advertised and accepted without certain knowledge, on either side, that the condition of the roads was such that coaches could pass over the route, and, after trial, it was found that they were not such as to permit the execution of said contract, according to its terms—*DECIDED*, that the contractor be released from further obligations under it, and that he receive compensation for transporting the mail by steamboat, &c. *Toby's case*, 492.
 9. The acts of 3d March, 1825, and 2d July, 1836, do not authorize the payment of additional compensation to contractors for transporting the mail in cases where the time of the transit only is changed, even though additional conveyances shall be required, but where the mail is carried between the same *termini* no oftener, and there is no increase of expedition on the route. *Advice*, 542.
 10. The act of 2d July, 1836, provides for the manner in which changes are to be made in the terms of any existing contract, other than those having reference to additional service or increase of expedition. *Ibid.*
 11. Where the acceptance of a Postmaster General had been given in payment of

POSTMASTER GENERAL (*Continued.*)

an account for work done, and the amount thereof had been recharged by a subsequent Postmaster General—*DECIDED*, that the amount of the acceptance ought not to be deducted from an account-current for other work. *Case of Blair & Rives*, 624.

12. The Postmaster General ought not to meddle with any case of forfeiture finally disposed of on deliberate examination by his predecessors. *Advice*, 684.
13. The Postmaster General is vested with a discretion concerning forfeitures not passed upon. *Ibid.*

POSTMASTERS.

1. Postmasters cannot lawfully receive to be conveyed in the mail any packet weighing more than three pounds in any case whatever, except such as are specially provided for in the act of the 19th December, 1821, and the joint resolution of the 13th of January, 1831. *Advice*, 164.
2. A proviso touching the duties of postmasters to make returns of emoluments received from boxes, contained in a general appropriation bill, to take effect at the commencement of a fiscal year then future, is to be considered as having effect from the date of its passage. *Advice*, 610.
3. The circuit courts of the United States have not power to enjoin the Auditor of the Post Office Department from paying a contractor for carrying the mails, nor to enjoin the contractor from making collections from postmasters, according to his contract with the government. *Advice*, 667.

PRE-EMPTIONS.

See PUBLIC LANDS.

PRESIDENT.

See EXECUTIVE.

PRINTING.

1. The person entitled to the printing of the Treasury Department, generally, should execute all the printing required by it, whether on paper or parchment, notwithstanding the error of the clerk in erroneously stating to the bidder for parchment that his bid for the printing of it was accepted. *Advice*, 469.
2. Where the contractor for parchments for land patents delivered a portion of them in printed form and received payment therefor, augmented by the price of the printing—*DECIDED*, that the amount thus erroneously paid may be deducted from other sums yet due him. *Advice*, 539.
3. The contractors for the printing of parchments cannot be paid for such printing; nor are they entitled to the amount thus overpaid to the contractor for parchment. *Ibid.*

PRIORITY.

1. The United States have the right to retain moneys awarded under the French treaty of 1831, to a firm of which one member is indebted to the government upon a bond for duties on goods imported for the firm, and to apply the same upon the bonds. *Advice*, 163.
2. Where a receiver of public moneys at Kalamazoo received in payment for public lands the notes of a specie-paying bank that afterwards suspended specie-payments, and then took from the bank a draft on another bank which was returned dishonored; and a receiver of assets having been appointed under the laws of Michigan, with whom the receiver of public moneys filed a claim for this debt—*HOLD*, that, notwithstanding the acts of the latter, the legal priority of the United States to payment still exists. *Advice*, 625.

PRIZES.

1. Distribution of certain moneys, appropriated by Congress as prize-money, among the officers and crew of two gun-boats, must be made in the proportions and to the persons pointed out by the general laws and regulations of the navy applicable to the subject. *Advice*, 461.

PUBLIC LANDS.

See LANDS.

REGISTERS.

1. The Spanish schooner *Amistad* having been condemned (not for any breach

REGISTERS (*Continued.*)

of the laws of the United States,) and sold by order of the district court of the United States for the State of Connecticut, and the purchasers having applied for a register—*DECIDED*, that he is not entitled to a register, but that documents showing the order of sale, its execution by the proper officer of the United States, and the purchase and title of the present owner, ought to be issued to him. *Advice*, 606.

ROADS.

1. The Cumberland Road is under the charge of a superintendent, who has authority to disburse funds committed to his care by turning over the same to officers employed under him. *Advice*, 140.
2. Yet he must be held personally accountable at the treasury for the correct disbursement thereof. *Ibid.*
3. Where Congress appropriated an amount equal to the sum claimed by a contractor on the Cumberland road for extra work, submitted to that body by the Secretary of War, there can be no valid objection to the payment thereof. *Advice*, 168.
4. By force of the act of 3d March, 1837, modifying that of July 2, 1836, the question whether the work in each State on said road shall be executed continuously or not, is left to the discretion of the Secretary of War, except that in the exercise of his discretion, he must observe the last proviso of the act of 3d March, 1837. *Advice*, 403.

RESTORATION.

1. The schooner *Amistad*, a Spanish vessel, having cleared from one Spanish port bound to another, with regular papers and a cargo of merchandise and slaves; and whilst at sea, being subjected to the control of the negroes on board, by their rising upon the whites and killing the captain, his servant, and two of his seamen, and assuming command with a view to carry the vessel to the coast of Africa, but failing in that object through the contrivance of two white Spaniards who run her near to the coast of the United States, where she was taken by a vessel of the United States and sent into New London for examination and such proceedings as the law of nations warranted and required; and being demanded, with the negroes, by the Spanish minister, under the ninth article of the treaty of October 27, 1795, between Spain and the United States—*DECIDED*, that the case is within said ninth article of the said treaty, and that the said vessel and cargo be restored to the owners, as far as practicable, entire. *Advice*, 484.
2. The President is advised to issue his order to the marshal, in whose custody the vessel and cargo are, to deliver the same to such persons as may be designated by the Spanish minister to receive them. *Ibid.*

SALARIES.

See COMPENSATION.

SEAMEN.

1. Merchant seamen only are entitled to aid from the fund at the disposal of the Secretary of State. As it was raised by deductions out of the wages of merchant seamen, justice to them requires that they only shall be entitled to receive it when in distress at foreign consulates. *Advice*, 683.
2. Seamen on board ships of war are not entitled to pecuniary assistance from consuls under the acts of 1792 and 1803. *Advice*, 685.

SIGNATURES.

1. It is a sufficient compliance with the provisions of the act of July 4, 1836, for the engrossing clerks to write the name of the President to patents, and for the secretary thereafter to test them by his signature. *Advice*, 623.
2. All the duties respecting the execution of patents, except the attestation, are ministerial, and may be performed either by the clerks or by the secretary. *Ibid.*
3. The countersignature of the recorder of land patents, and seal of the office thereto attached, constitute a sufficient authentication of a patent for land. *Advice*, 630.

SLAVES AND THE SLAVE-TRADE.

1. Heads of Chickasaw families owning slaves are entitled to the reservations

SLAVES AND THE SLAVE TRADE (*Continued.*)

- provided by the fifth article of the treaty of May 24, 1834. *Advice*, 34.
2. The President has no power to cause fugitive slaves, who having taken refuge among the Indians west of the Mississippi, to be apprehended and delivered by the United States officers and agents to the owners from whom such slaves shall have fled. *Advice*, 370.
 3. Even where slaves shall have taken refuge in the States, the President has no authority to cause a surrender except when previously directed or empowered by a law. *Ibid.*
 4. Congress has been silent hitherto upon the subject of fugitives among Indians; and although it have the power to make regulations not inconsistent with subsisting treaty stipulations, until it shall have enacted a law in that respect, the President has no authority to interpose. *Ibid.*
 5. The United States are bound to pay the Spanish inhabitants of Florida the value of slaves carried away or killed by the troops of the United States shortly prior to the treaty with Spain of the 22d of February, 1819. *Advice*, 391.
 6. Remuneration should also be made for the services of such slaves as have been restored to their owners, during the period of time their owners were deprived of their services. *Ibid.*
 7. The slaves brought in with the schooner *Amistad*, being part of the cargo, should be surrendered to such persons as may be designated by the Spanish minister to receive them. *Advice*, 484.
 8. Steamboats and other vessels passing from Pontchartrain, by Lake Borgne and Pascagoula bay, to Mobile, and touching on their passage at intermediate places, are not to be considered as sailing coastwise, within the meaning of the act of 2d March, 1807, to prohibit the importation of slaves. *Advice*, 512.
 9. The object of the act is to prevent the slave-trade by vessels from the sea, without evidence that the slaves on board had been previously within the United States. *Ibid.*
 10. Steamboats and other vessels passing on any river or inland bay of the sea, within the jurisdiction of the United States, are not subject to the regulations provided in respect to exterior voyages, or those along the seacoast, or in open bays of the sea. *Advice*, 581.

SURETIES.

1. Sureties of a delinquent or defaulting principal obligor in a custom-house bond are not liable to detention of moneys due them—the phrase “who is in arrears to the United States,” contained in the act of 25th January, 1828, applying only to persons who, having previous transactions of a pecuniary nature with the government, are found upon the settlement of those transactions to be in arrears. *Advice*, 52.

SURGEONS.

1. The arrangements for the surveying and exploring expedition being at the discretion of the President, he may appoint and employ a medical assistant thereto without the formality of an examination and approval by the board of surgeons. *Advice*, 289.
2. The assistant surgeon is entitled to the pay of a surgeon whenever he is called to discharge the peculiar duties of a surgeon; but those duties must be such as can only be performed by him when present. *Advice*, 308.

SURRENDER.

See **EXECUTIVE, EXTRADITION.**

SURVEYS.

See **PUBLIC LANDS.**

TREATIES.

See **INDIANS, PUBLIC LANDS.**

VACANCIES.

See **APPOINTMENTS.**

WARRANTS.

See **PUBLIC LANDS.**

WASHINGTON CITY.

1. The orphans' court of Washington has power to grant letters of administration in respect to assets existing in the county, and payments made by the Treasury Department, to an administrator thus appointed, are regular; yet, in a case where the decedent resided in Baltimore, and left a will appointing an executor there, and letters granting administration *de bonis non* are afterwards granted in Maryland upon the same estate, the letters issued in Washington become subordinate to them. *Advice*, 89.
 2. The Secretary of the Treasury may give to the corporation of the city of Washington the certificate described in the seventh section of the act vesting in that corporation the rights of the said company and for other purposes, passed May 31, 1832; notwithstanding the work was not completed by the 1st March, 1833; provided the work has been finished in the manner prescribed and the time when it was completed be actually stated. *Advice*, 290.
 3. The entire legacy bequeathed to the United States by James Smithson for the purpose of founding an establishment in the city of Washington for the increase and diffusion of knowledge, should be kept entire for effectuating the purposes of the testator. *Advice*, 383.
 4. Repairs in front of leased tenements in the city of Washington are, by act of the corporation of the 1st of August, 1831, required to be made by the owners, who are, in general, the lessors; and where the leases are silent upon the subject of such repairs, the law regulating repairs in the District may properly be considered and taken as a part of the contract. *Advice*, 486.
- S. L. C. C.

